IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

NO. 78-5420

THEODORE PAYTON,

Appellant,

v.

NEW YORK.

ON APPEAL FROM THE NEW YORK
COURT OF APPEALS

JURISDICTIONAL STATEMENT

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Appellant appeals from a judgment of the New York Court of Appeals rendered on July 11, 1978, affirming an order of the Supreme Court of the State of New York, Appellate Division, First Department, which affirmed a judgment of the Supreme Court, New York County, convicting him of felony murder and sentencing him to 15 years to life imprisonment and submits this Statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

CITATION TO OPINIONS BELOW

The majority and dissenting opinions of the New York Court of Appeals are officially reported at 45 N.Y.2d 300, and are annexed as Appendix A. The order of the Appellate Division, First Department is reported at 55 A.D.2d 859, and is annexed as Appendix B. The opinion of the Supreme Court, New York County, denying, in part, appellant's pretrial motion to suppress evidence is reported at 84 Misc.2d 973, and is annexed as Appendix C. The opinion of the Supreme Court, New York County, denying appellant's post-trial motion to set aside the verdict is not reported and is annexed as Appendix D.

JURISDICTION

In affirming appellant's conviction, the New York Court of Appeals sustained the constitutionality of former sections 177 and 178 of the New York Code of Criminal Procedure which authorized warrantless arrests within a private dwelling. The judgment of the Court of Appeals was entered on July 11, 1978 and is annexed as Appendix E. A notice of appeal was filed in Supreme Court, New York County, the court possessed of the record, on September 12, 1978 and is annexed as Appendix F. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Court to review the judgment of the New York Court of Appeals. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n.3 (1963); Dahnke-Walker Milling Company v. Bondurant, 257 U.S. 282, 288-90 (1921).

QUESTIONS PRESENTED

1. Whether former sections 177 and 178 of the New York Code of Criminal Procedure, authorizing a forcible police entry into a private dwelling for purposes of arrest without a warrant and without exigent circumstances, contravene the Fourth Amendment.

2. Whether admission into evidence, under the "inevitable discovery" doctrine, of a Firearm Transaction Record and the testimony of its custodian obtained by police as the direct result of a unlawful search was permissible under the Fourth Amendment.

3. Whether a preponderance of the evidence standard may constitutionally be utilized by a trial judge making a determination that evidence obtained in violation of the Fourth Amendment would nonetheless have been "inevitably discovered" by the police.*/

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV and XIV.

STATUTORY PROVISIONS INVOLVED

FORMER NEW YORK CODE OF CRIMINAL PROCEDURE §§177 and 178 (66 McKinney's Laws, Ch. 4):

> §177. In what cases allowed.
>
> A peace officer may, without a warrant, arrest a person,

*/ With respect to questions 2 and 3, the Court's certiorari jurisdiction is also invoked pursuant to 28 U.S.C. §1257(3).

1. For an offense, committed or attempted in his presence, or where a police officer as enumerated in section one hundred fifty-four-a of the code of criminal procedure, has reasonable grounds for believing that an offense is being committed in his presence.

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code.

§178. May break open a door or window, if admittance refused.

To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

STATEMENT OF THE CASE

On the morning of January 12, 1970, the manager of a service station in upper Manhattan was shot and killed in the course of a robbery. Two days later, on January 14, two witnesses, both of whom had known appellant, told the investigating officer, Detective Malfer, that appellant had committed the crime. Later that day, Malfer was taken to appellant's apartment building by one of the witnesses. However, the detective made no attempt to arrest appellant at that time, and he made no effort to obtain an arrest or search warrant.

The following morning at 7:30 a.m., Malfer returned to appellant's apartment, accompanied by a police sergeant and three other detectives. Although they saw a light shining beneath the door and heard a radio playing, there was no answer to their knock on the door. Unable to break through the apartment's metal door, they sought assistance from the Police Department's Emergency Services Division. An hour later, officers from that division arrived and, with crowbars, broke through the door.

Once inside the apartment, the police immediately learned that appellant was not there. Nonetheless, they conducted a thorough search of the apartment; the contents of drawers were dumped out, cupboards and closets were opened and examined and the officers looked beneath a mattress. The search uncovered a shotgun and some ammunition, several photographs, and a sales receipt for the purchase of a Winchester rifle. Detective Malfer also seized a .30 caliber shell casing which he observed on top of a stereo set. The following day, appellant surrendered himself and was subsequently indicted for felony murder and intentional murder.

At the conclusion of a pretrial suppression hearing, the court, on concession of the prosecution, suppressed all of the items taken from the apartment except the .30 caliber shell casing. The court held that the casing had been observed in "plain view" while the police, pursuant to sections 177 and 178 of the Code of Criminal Procedure, were lawfully in the premises to make a warrantless arrest for a felony which they had reasonable grounds to believe appellant had committed. (App. C., pp. 1, 2).

At trial, six witnesses to the crime testified. Each estimated the height and weight of the perpetrator and each agreed that all but the perpetrator's mouth and eyes were covered by a ski mask. Two of the witnesses, Melvin Gittens and Raymond Williams, stated they could identify appellant because of a prior acquaintance with him. Both Williams and Gittens had serious criminal records of their own*/ and both had initially told the police they could not recognize the perpetrator.**/

*/ Gittens had actually been at the service station to meet his lawyer for the purpose of arranging his surrender on a homicide charge. While in the army, he had been convicted for sodomy for which he received a five year sentence and dishonorable discharge. Williams had four prior felony convictions, the most recent of which had been for attempted murder of a police officer. At the time of trial, Williams was serving a 10 year sentence and was due to see the Parole Board within a few months.

**/ Gittens testified that he "didn't feel like getting involved" until his lawyer mentioned that it was "too bad" he didn't know the perpetrators. Gittens stated he did, and his lawyer arranged a meeting with the district attorney at which he named appellant. Gittens was then allowed to plead guilty to first degree manslaughter, received a five year sentence from which he was paroled after 18 months, and was on parole at the time of the trial. Williams, who worked at the gas station, waited two weeks to tell anyone about appellant's involvement. And this occurred only when he was interrogated by Detective Malfer who indicated that an arrest had been made of a suspect whom the police knew to patronize a bar which Williams, himself, frequented.

Another prosecution witness, Jesse Leggett, testified that on the evening of January 12, he met appellant in a bar and appellant told him that he had held up a gas station. When he called appellant's attention to a news article about the crime in this case, appellant stated that it was the one to which he was referring. Leggett also stated that on the afternoon of January 13, appellant again entered the bar, carrying a gun case. While the case was never opened, Leggett asserted that it contained a 30/30 Winchester rifle, an assumption based on his previously having seen such a rifle when he and appellant had gone hunting together in various parts of New York State. Leggett further testified that appellant said he was going to dispose of the rifle and he, Leggett, advised appellant to give himself up. Leggett also had an extensive criminal record*/ and despite appellant's statements about the crime, made no effort to inform the police about them. It was only when, on January 14, Leggett himself had been picked up by the Nassau County police as a suspect in a unrelated robbery case that he came forward, during his own interrogation, with information about the gas station robbery.

The .30 caliber shell casing seized from appellant's apartment was place in evidence, as were two shell casings found on the floor of the service station and the prosecution's ballistics expert testified that all had been fired from the same gun. The prosecution also called Sidney Roseman, the owner of a sporting goods store in Peekskill, New York, the store which had issued the rifle sales receipt seized during the search of appellant's apartment but suppressed prior to trial. Roseman testified that on November 19, 1969, he had sold a 30/30 Winchester rifle and some ammunition to a man named Theodore Payton and had "thrown in" a black leather gun case. Roseman admitted, however, that he had little independent recollection of the sale, could not recall at all what the purchaser had looked like and testified that appellant did not look familiar to him. He admitted further that his ability to name appellant was derived solely from the Firearm Transaction Record he had filled out at the time of the purchase, the information for which he took from a driver's license provided by the purchaser of the rifle. This federally-required Firearm Transaction Record, which bore appellant's signature, was received in evidence. The defense objected to both Roseman's testimony and the Firearm Transaction Record as "tainted fruit" of the unlawful seizure of the suppressed sales receipt.*/

No witnesses were called by the defense and the jury found appellant guilty of felony murder but were unable to reach a verdict on intentional murder.**/ The defense moved promptly to set aside the verdict, claiming that the conviction had been based upon tainted evidence. The trial judge ordered a hearing, rejecting the prosecution's argument that even assuming inadmissibility, the Firearm Transaction Record and Roseman's testimony were only "a very small part of the People's case."

At the hearing, Leggett testified that he had made several hunting trips with appellant, that they would drive upstate on either Route 9 or Route 17, and that on one occasion he had been with appellant when appellant had purchased a shotgun at a store called "Tony's" in Ossining, New York. Leggett stated that he told Detective Malfer of this incident and also told him that appellant mentioned the purchase of a 30/30 Winchester in "upstate New York."

Malfer conceded that he had been led directly to Roseman by the illegally seized sales receipt. He stated that from Leggett he had learned only that appellant had purchased a shotgun at Tony's in Ossining and a 30/30 Winchester "somewhere upstate." Had he not found the sales receipt in appellant's apartment, Malfer asserted he would have obtained a list of gun dealers in the state and would have contacted "various stores on the list." He also stated he would have

*/At the time of appellant's trial, Leggett was facing attempted murder charges for shooting his mother-in-law. Following his testimony in this case, Leggett had an upcoming court date on that charge at which he was planning to enter a guilty plea for which he expected to receive a sentence of probation. He had previously been convicted for various assaults, theft, and gambling offenses.

*/ The prosecution also called a handwriting expert who testified that he had compared the buyer's signature on the Firearm Transaction Record with appellant's and concluded they were the same.

**/ The case was submitted to the jury at 2:45 p.m. on June 20, 1974 and the verdict was rendered at 6:10 p.m. the following day. The jury interrupted deliberations to request rereadings of various portions of the testimony of Leggett, Williams, Gittens and Gittens's lawyer and to request supplemental instructions on reasonable doubt and intentional murder.

driven upstated with Leggett in an attempt to find the store where the second purchase had been made.*/

Cross-examined, Malfer stated he "probably would have" contacted every gunshop in New York State. He admitted, however, that he had never personally conducted, nor had he ever heard of anyone else conducting, so extensive a search. He further maintained that he would have concentrated his efforts on the environs of the White Plains office of the Federal Bureau of Alcohol, Tobacco and Firearms. His reason: that the White Plains area "proved to be" the one in which he was interested. Lastly, the detective also claimed that he would have taken Leggett to Tony's in Ossining and that their next stop would have been Mr. Roseman's store on the northern side of Route 9.**/ Asked why he was sure he would have traveled north, rather than east, west or south, he answered only that it "made sense" to do so since Leggett had said that the rifle had been purchased "'upstate.'"

Detective Joseph Brady, who had also participated in the search of appellant's apartment, testified that had it been necessary, he too would have contacted all 1100 licensed gun dealers in New York State but he would have concentrated on the Catskill area because he recalled that Leggett had mentioned the Catskills as one of the places he had gone hunting with appellant.

The court denied appellant's motion to set aside the verdict, stating that, under what it deemed to be the appropriate standard of a preponderance of the evidence, "the evidence supports the People's claim that normal police investigative techniques would have uncovered the Peekskill gun dealer." The court added, however, "that if the test

*/ At trial, Malfer stated initially that he had contacted the Treasury Department in Washington for information about the weapon but, after admitting that his memo book contained no such indication, he stated that he could not recall making such a call. It was also clear from Roseman's trial testimony that there was no central registry from which Malfer could have obtained such information because Roseman was required by law to retain all Firearm Transaction Records.

**/ In its subsequent findings, the hearing judge found it was "not clear" whether Malfer had known prior to trial about the earlier purchase of the shotgun at Tony's. (App. D, p. 1).

was either 'clear and convincing evidence' or 'beyond a reasonable doubt,' I would conclude that in this particular case the People did not meet either such standard." (App. D., p. 3).

On appeal to the Appellate Division, appellant challenged the constitutionality of the forcible, warrantless entry of his home and the statute under which it was authorized as well as the trial judge's ruling on inevitable discovery and the use of the preponderance standard to determine that issue. The Appellate Division unanimously affirmed appellant's conviction without opinion. (App. B.)

The same issues were raised before the Court of Appeals, which, by divided vote of 4-3, affirmed the order of the Appellate Division. With respect to the warrantless entry of appellant's apartment, on which the admissibility of the .30 caliber shell casing turned, the majority held that police entry of a home for the purpose of arrest, "if based on probable cause, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances." (App. A., p. 1).

Noting that this Court had not yet resolved the issue, [App. A., pp. 5, 6], the majority reasoned that there "was a substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for purpose of making an arrest," as well as a "significant difference in the governmental interest in achieving the objective of the intrusion in the two instances." Thus, a warrantless entry for a search will be "both more extensive and more intensive," while entry for arrest will be achieved without "accompanying prying into the area of expected privacy attending [a person's] possessions and affairs." (App. A., p. 6).

The majority found support in "[t]he apparent historical acceptance in the English common law of warrantless entries to make felony arrests" and in "the existence of statutory authority for such entries in this State since the enactment of the Code of Criminal Procedure in 1881, that a number of jurisdictions other than our own have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest," and that the "American Law Institute's

Model Code of Pre-Arraignment Procedure makes similar provision..."*/ That "considered decisions in the federal courts have reached the opposite result" was noted. (App. A., pp. 7, 8).

The dissenters maintained that absent exigent circumstances, the police are constitutionally required to have a warrant to enter a home to arrest or seize a person. Writing on the warrant issue, Judge Cooke emphasized that "from the standpoint of the citizen--to whom the language of the Fourth Amendment is directed--it makes little difference whether the invasion of the privacy of his home was made to effect a warrantless arrest or a warrantless search." And while "the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years, ...neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented here." (App. A., pp. 17, 20).**/

On the issue of whether the testimony of the Peekskill gun store owner and the Firearm Transaction Record were tainted by the illegal search of appellant's apartment, the majority held that the "inevitable discovery" doctrine "does not call for certitude"; that what is required "is that there be a very high degree of probability that the evidence in question would have been obtained independently of the tainted source," and that "[t]he proof in this case meets that standard." (App. A., p. 9).

In dissent, Judge Wachtler labeled the evidence "a classic example of poisoned fruit" and argued that to apply the inevitable discovery doctrine "permits the court to ignore what really happened and to rely instead on hypothesis." (App. A., p. 12). He emphasized that the police

*/ Appellant's case drew into question the validity of sections 177 and 178 of New York's former Code of Criminal Procedure which was replaced on September 1, 1971 by sections 140.10, 140.15(4) and 140.25(1)-(3) of the Criminal Procedure Law. As the majority noted, "the substance of the provisions was continued and expanded" in the present statute. (App. A., p. 7, n.3). Thus, in the companion case of People v. Riddick, the majority applied the same analysis in sustaining the validity of those provisions of the Criminal Procedure Law. As we are also counsel to Mr. Riddick, a Jurisdictional Statement with respect to his case has been filed simultaneously with appellant Payton's Jurisdictional Statement. But due to the presence of other issues in Mr. Payton's case we thought it best, in the interests of clarity, not to consolidate the two cases into a single Jurisdictional Statement.

**/ Neither the majority nor Judges Cook and Fuchsberg shared Judge Wachtler's belief that exigent circumstances were present in this case.

could not have obtained a record of the sale from the Federal government; that they would therefore have had to check with a substantial number of gun dealers throughout the state which "would have involved such an effort that the police officers themselves admitted that they could not recall a single instance where an investigation of this nature and magnitude had been undertaken." (App. A., pp. 12, 13). To arrive at such a result, Judge Wachtler maintained, the majority had diluted the standard of "'certitude'" established previously so that all the police need now show is "that they could have obtained the evidence lawfully by employing some other technique, no matter how hypothetical and no matter how involved or extraordinary resort to the procedure would have been." (App. A., p. 13). Judge Fuchsberg stated that the majority's departure from a standard of "true inevitability" required that the prosecution prove that "lawful discovery could have taken place beyond a reasonable doubt." (App. A., p. 15).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

This case presents the important question of whether, in the absence of any recognized exception to the warrant requirement of the Fourth Amendment, police officers may, to effect an arrest, forcibly enter a person's home without a warrant and in the absence of exigent circumstances. The issue is posed squarely in this case for, in seeking to arrest appellant, the police broke down the door to his apartment despite the absence of any exigency and without any attempt to obtain a warrant. The Court of Appeals held that New York's arrest statute, which authorized such conduct, was constitutional. The question merits full briefing and plenary review because of its intrinsic seriousness and because of the sharp split of authority among state and federal courts on its proper resolution.

While this Court has yet to decide the issue here presented the Court, in a number of cases in which its resolution was not required, has repeatedly recognized its substantial nature. United States v. Santana, 427 U.S. 38, 45 (1976)(Marshall, J. dissenting); United States v. Watson, 423 U.S. 411, 418, n.6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n. 13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 481

(1971); Jones v. United States, 357 U.S. 493, 499-500 (1958).

The issue is of great importance because it involves the two fundamental interests secured by the Fourth Amendment, privacy of the home and security of the person. In all other Fourth Amendment cases involving intrusions into the privacy of the home, this Court has held the intrusion strictly regulated by the warrant requirement. Nonetheless, the majority below held that entry into the home to seize a person is uniquely exempt from regulation by the warrant requirement. As the dissent points out, this interpretation of the Fourth Amendment thus affords greater protection to a person's property within his home, than it does to his person. This anomalous construction of the Fourth Amendment, and the vital interests which it implicates, justifies plenary review.

Review is also merited because of the conflict between the decision below and those of most courts, federal and state, which have considered this question. Most significantly, the decision conflicts squarely with the Second Circuit's recent decision in United States v. Reed, 572 F.2d 412 (2d Cir., 1978) which held, in no uncertain terms, that absent exigent circumstances, warrants are required for arrests within the home. Such disparate constructions of the Fourth Amendment by the highest appellate courts in the same jurisdiction have obvious undesirable consequences to the administration of justice and require resolution. See, Mincey v. Arizona, 98 S. Ct. 2408, 2419 (1978) (Marshall, J. concurring).[1/]

The decision below not only conflicts with that of the Second Circuit, it is also at odds with the result reached by all but one of the circuit courts of appeal which have ruled on the issue. Salvador v. United States, 505 F.2d 1348, 1351-52 (8th Cir., 1974); United States v. Phillips, 497 F.2d 1131 (9th Cir., 1974); United States v. Shye, 492 F.2d 886, 891-93 (6th Cir., 1974); Dorman v. United States, 435 F.2d 385 (D.C. Cir., 1970); Vance v. North Carolina, 432 F.2d 984, 990-91 (4th Cir., 1970); contra, United States ex rel. Wright v. Woods, 432 F.2d 1143 (7th Cir., 1970), cert. denied, 401 U.S. 966 (1971).[2/]

Among state courts, too, the larger number to have considered the question have taken the position that warrants are required for arrests in the home. See, State v. Cook, 115 Ariz. 188, 564 P.2d 877 (1977); People v. Ramey, 16 Cal.3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (In Banc), cert. denied, 429 U.S. 929 (1976); People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971); Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975); Laasch v. State, ___ Wis. ___, 23 Cr. L. Rep. 2404 (Aug. 9, 1978); but see, State v. Perez, 277 So.2d 778 (Fla.), cert. denied, 414 U.S. 1064 (1973); People v. Eddington, 23 Mich. App. 210, 173 N.W.2d 686 (1970), aff'd, 387 Mich. 551, 198 N.W.2d 297 (1972). Of course, a large number of states, like New York, have statutes which authorize warrantless arrests in the home. See ALI Model Code of Pre-Arraignment Procedure, Appendix XI at 696 (1975). Although New York had upheld the validity of its statutes in this case, the constitutionality of those statutes and the similar ones in other states remains in doubt due to the substantial body of case law to the contrary. Accordingly, the question of validity of the New York statutes which authorize warrantless arrests in the home is of substantial constitutional dimension and should be granted plenary review.

II.

The application of the inevitable discovery doctrine by the majority below to sustain the admissibility of the Firearm Transaction Record and the testimony of its custodian, Mr. Roseman, the Peekskill gun store owner, presents a substantial constitutional question meriting review. This Court had never ruled explicitly upon the validity of the inevitable discovery doctrine as a constitutionally permissible basis for the admission of evidence obtained as the direct result of an unlawful search. See, Note: The Inevitable Discovery Exception to the Constitutional Exclusionary Rules, 74 Colum. L. Rev. 88, 90-91 (1974). Several members of the Court, however, have acknowledged the seriousness of the issue, expressing concern both as to whether the independent source exception "encompasses a hypothetical as well as an

1/ The question will undoubtedly arise as to the admissibility of evidence obtained unlawfully under Reed by federal officers which is turned over to state law enforcement officials for use in prosecutions under state law. Since New York recognizes no unlawfulness in such circumstances, there may indeed be a recurrence of the "silver platter" doctrine See Elkins v. United States, 364 U.S. 206 (1960).

2/ District courts in at least two circuits where the question remains open have also held that warrants are required. United States v. Weinberg, 345 F. Supp. 824, 837-838 (E.D. Pa. 1972), aff'd in pt., 478 F.2d 1381 (3d Cir., 1973), cert den. 414 U.S. 1005; Huotari v. Vandergoot, 380 F. Supp. 645, 649-51 (D. Minn., 1974).

actual independent source," [Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973)(White, J. and Douglas, J. dissenting from the denial of certiorari)], and in a related context, with the consequences to the exclusionary rule of a standard which makes "the exclusion decision turn not on what events transpired but on what might have transpired." Jarvis v. United States, 55 L.Ed. 2d 532, 533 (1978)(White, J. and Brennan, J. dissenting from the denial of certiorari).

What compels review of the inevitable discovery issue in this case is the degree to which the New York Court of Appeals has itself departed from the standard of certainty upon which it had insisted in Fitzpatrick.[3/] As Judge Wachtler emphasized in dissent below, discovery of the Firearm Transaction Record was not based "on the type of inevitability which was contemplated in Fitzpatrick (supra, at p. 507) where the Court repeatedly noted that discovery of the evidence was 'certain' and the police had only to look in the next most reasonable place." (App. A., p. 13). Rather, by now requiring only "'a very high degree of probability,'" the court had made it possible for the police in any case, with the benefit of hindsight, to "show that they could have obtained the evidence lawfully by employing some other technique, no matter how hypothetical and no matter how involved or extraordinary resort to the procedure would have been." (Ibid.)

In order to "untaint" the fruit of the egregiously unlawful police conduct in this case, the majority relied on a process of hypothesizing an independent source based, not upon certainty, but upon probability. The record in this case underscores vividly the inherent danger of such an approach and the hindsight upon which it is premised.

3/ There are, of course, important factual distinctions between this case and Fitzpatrick which, assuming arguendo the general validity of the inevitable discovery doctrine, may be of relevance to a determination as to the appropriateness of its application in a given case. In Fitzpatrick, the failure to afford the defendant Miranda warnings resulted in a statement directing the police to a closet in which the murder weapon and ammunition were hidden. In this case, the police conducted an extensive, unlawful search of appellant's home. Without placing greater value upon rights under the Fourth Amendment, the unlawful conduct of the police in this case was far more severe, and thus arguably more demanding of exclusionary rule application, than the police conduct in Fitzpatrick. See, United States v. Ceccolini, 55 L.Ed. 2d 268, 279 (1978).

At first, the prosecution contended that information about appellant's purchase of a rifle was readily available from a central federal registry. Detective Malfer quickly volunteered that he had, in fact, contacted that agency. However, Malfer retreated from that statement when his own memo book established that he had made no contact with any agency. Moreover, Roseman's testimony established that records of gun sales were never sent to any central agency. A new hypothesis was then proferred; that the police, knowledgeable about the purchase of a shotgun in Ossining, "inevitably" would have proceeded to Peekskill, where Roseman's store was located, because to Malfer it "made sense" to go north. This hypothesis dissipated when the trial court refused to credit the testimony of Malfer and Leggett that information about the Ossining shotgun purchase was known to the police before trial. (App. D., p. 1). Although the majority refers to Malfer's testimony on this point, the decision appears to turn on the broadest hypothesis tendered: that it was normal police procedure to obtain from the Treasury Department a list of all gun shops and then to communicate with all such shops in an effort to locate the weapon sought, and therefore that such effort would have included contact with the Peekskill store. (App. A., pp. 9, 10). To accept such conjecture, in a case where the police witnesses themselves admitted they had never heard of an investigation of such magnitude conducted in similar circumstances, seriously undermines Fourth Amendment safeguards.

As this Court has emphasized frequently, the primary rationale for the exclusionary rule is deterrence of official misconduct. See, United States v. Calandra, 414 U.S. 338, 347-48 (1974). Underlying the "fruit of the poisonous tree doctrine" is the concomitant principle that the State should not reap the benefit of unlawful police conduct. Wong Sun v. United States, 371 U.S. 471, 484, 485 (1963). The result below disserves these principles. For, in this case, the conduct of the police which led directly to their location of the Firearm Transaction Record was paradigmatically unlawful--the precise type of behavior to which the message of the exclusionary rule is, in a classic sense, addressed.

Having broken down the door to appellant's home, ostensibly to gain entry for the purpose of arrest, the police immediately learned that he was not there. Undaunted, they proceeded to search his apart-

ment extensively by looking under a mattress, opening closets, and rummaging through drawers and cupboards. The unlawfulness of this conduct was quickly conceded by the prosecution prior to trial, and the police readily admitted that the location of the Firearm Transaction Record was the direct result of the search.

The tension between the rationale of the exclusionary rule and the yet to be approved "inevitable discovery" exception to the rule is thus squarely presented in this case.[4/] On one hand, there is unlawful police conduct of the most serious kind to which the principle of deterrence must be addressed. On the other, is the utilization of a process of hypothisation which, in the words of Judge Wachtler, "can only serve to erode the exclusionary rule." (App. A., p. 13).[5/] The question warrants plenary review.

4/ The conflict between the New York Court of Appeals and the Second Circuit [United States v. Paroutian, 299 F.2d 486 (2d Cir., 1962)] on this question, referred to by Mr. Justice White in his dissent from the denial of certiorari in Fitzpatrick, 414 U.S. at 1051, has also not abated.

5/ Our discussion, like that of the court below, has been concerned with the admission of the Firearm Transaction Record and the independent source analysis upon which it is based. The prosecution argued below, however, that as to the admissibility of the live testimony of Mr. Roseman, an attenuation analysis was also appropriate. The majority, in a footnote, stated only that "[a]s to the possible alternative ground for reaching this conclusion, namely that the testimony of the keeper of the gun shop was admissible under the attenuation rule with respect to the testimony of live witnesses, see People v. Mendez, (28 N.Y.2d 94) (compare also United States v. Ceccolini, ___U.S.___, 46 USLW 4229)." (App. A., p. 10, n.6). The reason for such minimal concern with Roseman's testimony itself is that without the Firearm Transaction Record, he had little independent recollection of the sale to appellant of the Winchester He did not remember what the purchaser looked like and admitted that appellant did not look familiar to him. Moreover, his ability to name appellant as the buyer was derived exclusively from the Firearm Transaction Record itself. Thus, without that record, Roseman's testimony would have been of little help to the prosecution's case.

We would only note that to apply an attenuation principle to Roseman's testimony would be unwarranted by Ceccolini and inconsistent with the Court's rejection of a per se rule in that case. First, Roseman's identity, unlike the witness Hennessey in Ceccolini, was entirely unknown to the police until their search of appellant's apartment uncovered the sales receipt. Second, the Firearm Transaction Record was used to examine Roseman at trial whereas the policy slips in Ceccolini were not used to question Hennessey. Third, and most critical, unlike Officer Biro's unintentional discovery of the policy slips in Ceccolini, the police in this case conducted an extensive and unlawful search with the specific intent of obtaining evidence.

In Ceccolini, the Court determined that each case must be examined to balance the benefits of the exclusionary rule, with its deterrent purpose, against the costs. 55 L.Ed. at 268. Excluding the fruit of the patently unlawful search in this case, albeit in the form of a live witness, "cannot be dismissed as of "negligible deterrent effect." 55 L.Ed. 2d at 279. See, United States v. Scios, ___F.2d___, D.C. Cir. on banc, July 21, 1975, D.C. No. 74-1019, slip. op., p. 11. To the extent that the footnote in the majority opinion below suggests an

(fn. cont'd.)

III.

The record in this case also presents the important question of whether a mere preponderance standard is constitutionally permissible for a determination that, based on a purely hypothetical set of circumstances, illegally obtained evidence would nonetheless have been discovered by the police.

In this case, the hearing judge found specifically that had he been required to adhere to either a "reasonable doubt" or "clear and convincing evidence" standard, the prosecution would not have sustained its burden of proving that by following normal police procedures, the Firearm Transaction Record in Mr. Roseman's possession would have been discovered. (App. D., p. 3). While the majority did not specifically address the issue, such a finding of fact by the trial court remains unaltered because the Court of Appeals, as noted elsewhere in the majority opinion, lacks jurisdiction to redetermine questions of fact based on credibility or on the weight of the evidence. (App. A., pp. 8, 9). See, also, Cohen and Karger, POWERS OF THE NEW YORK COURT OF APPEALS 447-52 (1952). Thus, in this case, the question of burden of proof was crucial.

The question of the specific nature of the burden of proof in inevitable discovery cases has not received extensive treatment by the lower courts and is, of course, ancillary to the primary question of whether the "inevitable discovery" doctrine is a valid exception to the exclusionary rule. (See pp. 12-15 ante). However, the Third Circu has expressed the view that a clear and convincing evidence standard is the appropriate one. Government of Virgin Islands v. Gereau, 502 F.2d 914, 927 (3rd Cir., 1974). And it is our submission that, at the very least, in order to secure the policies underlying the Fourth Amendment and because the "inevitable discovery" doctrine most closely parallels the independent source concept in the identification area, a burden of "clear and convincing evidence" is a minimum constitutional requirement. United States v. Wade, 388 U.S. 218, 240 (1968).

(fn. cont'd.)
alternative ground for the admissibility of Roseman's testimony, its extension of the attenuation doctrine to the facts of this case would also warrant review as a subsidiary issue.

Such conclusion is warranted because inevitable discovery is but one aspect of the broader category of "independent source." Indeed, it assumes a purely hypothetical, rather than an actual, independent basis for the admissibility of otherwise tainted evidence. Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973)(White, J. dissenting from the denial of certiorari). Thus, independent source cases, such as Wade, which require that the prosecution prove by "clear and convincing" evidence that there is an untainted basis for the challenged evidence, point strongly to that requirement where inevitable discovery is at issue.

With independent source analysis, the prosecution asserts that the challenged evidence was, in fact, developed through entirely lawful means, without exploitation of the principal illegality. See, Lawn v. United States, 355 U.S. 339 (1957). With inevitable discovery, the prosecution concedes exploitation but asserts that it would have taken such steps as would have led inevitably to discovery of the evidence in question: a purely hypothetical source. Thus, in this case, by a mere preponderence of the evidence, the hypothesis was accepted that a lawful investigation would have been undertaken and that it would have turned up the Firearm Transaction Record. Yet logic would seem to compel the conclusion that if the prosecution must prove by "clear and convincing evidence" an actual independent source [United States v. Wade, supra, 388 U.S. at 240], a fortiori, it should be required to do so when a hypothetical source is the object of its proof.[6/]

6/ Although the People, in their brief below, cited federal decisions which suggest a preponderance burden where independent source is involved, those cases dealt with issues very different from the inevitable discovery theory involved here. See, United States v. Ceccolini, 542 F.2d 136, 141-42 (2d Cir., 1976), rev'd on other grounds, 55 L.Ed. 2d 268 (1978); United States v. Cales, 493 F.2d 1215 (9th Cir., 1974); United States v. Falley, 489 F.2d 33, 40-41 (2d Cir., 1973); United States v. Cole, 463 F.2d 163, 172-174 (2d Cir., 1972). See also, Lego v. Twomey, 404 U.S. 477, 487, n.15 (1972). In these cases, the issue was one of actual taint; specifically, whether the antecedent illegality did in fact cause government agents to undertake the investigation which led to the challenged evidence, or whether information already in their possession through legal means had in fact provided the impetus for launching the investigation. Here, by contrast, actual taint is conceded, i.e., the People admit that the illegally found slip was what led the police to direct their inquiry to Mr. Roseman, but contend that even without reading Roseman's name on the sales slip, the police would have obtained the legally available information about gun dealers in the state which in turn would have led them to investigate the Peekskill store owner. Thus, while the above-cited cases required

(fn. cont'd.)

The policy of deterrence, which lies at the heart of the exclusionary rule, would seem to demand a far more stringent standard of proof than that applied by the trial court and affirmed implicitly by the majority in this case. A preponderance standard requires no more than that on the evidence adduced, the existence of facts at issue is more likely than their non-existence. As this case demonstrates, the prosecution will almost always be able to meet so low a burden by simply hypothesizing a number of steps leading to the source of the evidence which, with the benefit of hindsight, will appear logical "to a high degree of probability." Given the potential of the result reached by the court below for eradication of any serious meaning from the exclusionary rule, the burden of proof upon which the inevitable discovery doctrine is premised should be more demanding than a mere preponderance.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the court for their resolution.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Counsel for Appellant

September 18, 1978

THE OPINIONS ATTACHED AS APPENDICES ARE PRINTED IN MORE LEGIBLE FORM IN THE APPENDIX VOLUME AND HAVE NOT BEEN REPRODUCED HERE.

(fn. cont'd.)
the absence of actual taint to be proved by only a preponderance, they cannot be read as authority for the proposition that the far more speculative claim made herein should be tested against a similarly undemanding standard of proof. Indeed, the Second Circuit, from which all but one of the above-cited cases originated, would not even entertain so hypothetical a claim, regardless of how much proof the prosecution was prepared to offer; that Court follows a per se rule that where, as here, the challenged evidence was in fact discovered by exploiting the primary illegality, the evidence must be suppressed without further inquiry. United States v. Cole, supra, 463 F.2d at 174; United States v. Paroutian, supra, 299 F.2d at 489.

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-5420

THEODORE PAYTON
Appellant,

—vs.—

NEW YORK
Appellee.

No. 78-5421

OBIE RIDDICK
Appellant,

—vs.—

NEW YORK
Appellee.

APPEALS FROM THE NEW YORK COURT OF APPEALS

NO. 78-5420 FILED SEPTEMBER 19, 1978
NO. 78-5421 FILED SEPTEMBER 19, 1978
PROBABLE JURISDICTION NOTED DECEMBER 11, 1978

IN THE

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APPEALS FROM THE NEW YORK COURT OF APPEALS

INDEX

Chronological List of Important Dates

Payton v. *New York* (No. 78-5420)

March 30, 1970: Indictment filed.

April 5, 1970: Appellant arraigned in Supreme Court, New York County—enters plea of not guilty.

April 14, 1970: Appellant committed for mental examination pursuant to §§ 658, 870 of New York Code of Criminal Procedure.

June 9, 1970: Appellant committed to custody of Commissioner of Mental Hygiene by order of court.

April 5, 1972: Appellant re-arraigned on indictment and enters plea of not guilty.

May 16, 1974: Hearing on motion to suppress physical evidence.

June 4, 1974: Motion to suppress .30 caliber shell casing denied.

June 21, 1974: Appellant convicted after jury trial of murder (count one of indictment).

October 15, 1974: Hearing held on appellant's motion to set aside verdict.

October 29, 1974: Motion to set aside verdict denied; appellant sentenced to 15 years to life imprisonment.

December 16, 1976: Judgment of conviction unanimously affirmed without opinion by Appellate Division, First Department.

July 11, 1978: Conviction affirmed by New York Court of Appeals by vote of 4-3.

September 12, 1978: Notice of Appeal to U.S. Supreme Court filed.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[Filed March 30, 1970]

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

THEODORE PAYTON, DEFENDANT

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of MURDER, committed as follows:

The defendant, in the County of New York, on or about January 12, 1970, while engaged in the commission of the crime of Robbery and in the course of such crime, and in the furtherance thereof, and in immediate flight therefrom, caused the death of Roberto Carasas not a participant in the crime, by shooting him with a rifle.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of MURDER, committed as follows:

The defendant, in the County of New York, on or about January 12, 1970, with intent to cause the death of Roberto Carasas caused the death of Roberto Carasas by shooting him with a rifle.

FRANK S. HOGAN
District Attorney

SUPREME COURT, NEW YORK COUNTY

EXCERPTS FROM SUPPRESSION
HEARING TRANSCRIPT

[107] Colloquy

* * * *

THE COURT: Mr. Payton, we're going to complete this hearing today on the illegal search and seizure; I'll come down on your application for bail before twenty-four hours have elapsed. I want to read the other reports.

Is counsel here in the other case?

(Discussion off the record.)

THE COURT: We're going to take testimony on the suppression of tangible evidence, aren't we?

MR. JACOBS: Judge, as I have already submitted in my affidavit, I've stipulated to the fact that the search of the defendant's apartment was [108] illegal.

(Discussion off the record, at the bench, between the Court and attorneys in another matter.)

THE COURT: I have just inquired, while Mr. Payton was here and the reporter was here, on the motion to suppress tangible evidence I understood we were waiting for Detective Malfer to appear, but—

MR. JACOBS: He has not returned yet, Judge. But to expedite matters, I submitted a memorandum of law to the Court, and I gave a copy to Mr. Katz earlier, and the People are perfectly willing to concede that the search of the defendant's apartment on January 15th, 1970, 7:30 in the morning, was illegal.

The only piece of evidence that the People believe should not be suppressed in this case, as I put in the memorandum of law, is the Winchester shell which was found in plain view.

I've stated to the Court, I have already told—

THE COURT: Is it illegal because no warrant was obtained?

MR. JACOBS: That is correct, Judge.

[109] The People contend that the entry into the apart-

ment was legal, and I have already cited the appropriate authorities in my memorandum of law.

THE COURT: Wait a minute now.

The entry was legal.

MR. JACOBS: That's correct.

THE COURT: But the search was illegal.

MR. JACOBS: That is correct.

THE COURT: And the entry you maintain was legal because of provisions of C.P.L. 140.15.

MR. JACOBS: That is correct. And the appropriate cases under it, and the other cases that I have cited.

THE COURT: What cases are appropriate under it?

MR. JACOBS: Harris vs. United States.

THE COURT: Hold it just a minute.

The C.P.L. to which you make reference didn't come into effect until 1971.

MR. JACOBS: I put that in my memorandum, Judge. I'm aware of that.

THE COURT: Yes.

MR. JACOBS: And all I think that the C.P.L. [110] did in 1971 was codify the prior case law which I cite, and I believe that the Code of Criminal Procedure had appropriate sections similar to Section 140.15.

THE COURT: All right.

MR. JACOBS: I think I've stated that in my memorandum of law as well.

THE COURT: Okay.

MR. JACOBS: There's no question that the evidence that was found in bureau drawers and in the closet was illegally obtained. I'm perfectly willing to concede that, and I do so in my memorandum of law. There's no question about that.

THE COURT: Well, then on your concession you would—

MR. JACOBS: Items A and B.

THE COURT: —you would say that the Winchester —the motion then to suppress the Winchester shotgun and the fourteen shells found in the closet should be granted.

MR. JACOBS: That's correct.

THE COURT: All right.

That's by concession.

[111] MR. JACOBS: That's correct.

THE COURT: All right.

And you also concede that the three photos of the defendant in a ski mask and a bill of sale for the shotgun which was found in the drawer should also be suppressed.

MR. JACOBS: That is correct.

THE COURT: That takes care of two items.

Now, there's a third item, a .30 caliber Winchester casing which was found on top of the stereo in the living room in plain view, and you argue that that item should not be suppressed.

MR. JACOBS: That is correct.

THE COURT: All right, I'll hear you on it.

MR. JACOBS: Your Honor, I think we're dealing here with a very, very particular point of law, and I think it is a matter of law for the Court to determine.

It's the People's position that a police officer has a legal right to break into someone's apartment to look for that person if that person has committed a felony. I think the cases and section that I pointed out so hold. [112] However, in breaking into that apartment without a search warrant, the police are limited to what they can do, what they cannot do.

THE COURT: You mean they can just pick up the suspect and nothing more?

MR. JACOBS: That is correct, with one exception.

There's no question without a search warrant they cannot search the apartment. People are conceding that here.

However, if items of evidence are found in plain view the police officers cannot close their eyes to that, and I think have a perfectly legal right at that point to seize those items in plain view.

THE COURT: Now, what authorities do you have to support that position?

MR. JACOBS: I cited four cases in my memorandum of law, your Honor.

THE COURT: Haris vs. The United States, People vs. Gallmon,—

MR. JACOBS: No, those cases were of the entry, your Honor.

THE COURT: I beg your pardon.

[113] People vs. Ball, People vs. Boone, each reported in 41 App. Div. 2d; and People vs. Neulist, 72 Misc. 2d; and People vs. Avasino, 71 Misc. 2d.

Do defense counsel have a copy of this?

MR. KATZ: Yes, we were handed it this morning.

THE COURT: Okay.

MR. JACOBS: What the People are arguing, your Honor, is that there is an exception to the rule that when an entry is made for the purpose of finding a suspected felon, that they cannot search a premises; however, if contraband or evidence is in plain view the police officers have a right to seize that property.

And I think that the rationale of the cases that I've cited would be quite apparent to the Court.

In breaking into the apartment and the defendant not being there, the police officers see a .30 caliber Winchester shell in their plain view. Now, at that particular time the police officers knew on January 12th, 1970, that a .30 caliber Winchester rifle was the weapon used in the murder. [114] Now for the police officers to turn around and leave that apartment and not take the shell certainly I don't feel would be proper. There would be no point in obtaining a search warrant at that point; they are already there on the premises and the evidence is right before them.

THE COURT: I suppose one of the issues that I would have to decide is whether or not the assertion that the shell was where the police officers said it was was credible.

MR. JACOBS: Well, Judge, I think the People have been more than candid this morning.

THE COURT: No, no. Excuse me.

MR. JACOBS: I'm aware of that.

THE COURT: I'm not being critical, but—

MR. JACOBS: If Mr. Katz and Mr. Burns want Detective Malfer to get on the stand—I think I've gone

more so than most prosecutors would do in conceding this illegal search in certain items; I'm certain most prosecutors wouldn't do that. I felt that it would be fruitless to stand up here and try to argue the point. I had a particular point of law—

THE COURT: Mr. Jacobs, I've always found [115] you to be highly professional in everything you did when you appeared before me.

MR. JACOBS: Thank you.

THE COURT: Even in cases where I ruled against you.

MR. JACOBS: And there have been many.

If Mr. Katz and Mr. Burns would want Detective Malfer to get on the stand and say that the Winchester was found—that the Winchester casing was in plain view on the TV set, well, he should be back shortly and we can have him do that. I thought we can move this thing along.

THE COURT: I thought it could be decided merely as an issue of law upon the stipulated facts.

MR. JACOBS: That's correct, your Honor. I think it is a fairly technical point, and I'm willing to stipulate to it. If defense counsel want Detective Malfer to say that on the stand—

THE COURT: What is your wish in the matter, Mr. Katz, do you want to take testimony here?

MR. KATZ: Well, your Honor, it goes beyond the question of whether the item C set forth in the District Attorney's memorandum, namely, the [116] .30 caliber Winchester casing, should be suppressed. As the Court is aware, our motion goes beyond the mere suppression of physical evidence. It goes to the question of whether the statements, whether inculpatory or exculpatory, allegedly made by defendant, should be suppressed because of taint.

THE COURT: Well, assuming that the search was illegal.

MR. KATZ: Yes.

THE COURT: Which is the concession of the district attorney with respect to items A and B.

MR. KATZ: Yes.

THE COURT: Couldn't you argue—wouldn't you then be able to argue from that concession, that the police would not be able to question Mr. Payton but for that illegal search?

MR. KATZ: Yes.

THE COURT: What?

MR. KATZ: Yes.

THE COURT: Well, then—

MR. KATZ: No, I'm talking about whether we need Malfer back.

THE COURT: Well, do you? That's my question [117] to you.

MR. KATZ: Well, I think we do, your Honor.

THE COURT: Very well.

MR. KATZ: Because I think we have to get into the lead aspect of it, was it untainted and was it tainted.

I disagree most strenuously with the legal proposition cited with respect to the narrow issue, but in terms of physical suppression—

THE COURT: Okay.

MR. KATZ: —this Winchester casing I think should come in.

THE COURT: As soon as Mr. Malfer comes in we'll put him on the stand and continue with the hearing.

MR. KATZ: All right.

I don't agree that under the law as it existed then or as it exists now that the plain view aspect or the plain view sanitizes the unlawful entry.

Clearly they had sufficient time to get a warrant. Detective Malfer told us that—and indeed the district attorney told us—that this defendant was a suspect a day before.

[118] THE COURT: Are you familiar with the section upon which the district attorney relies, 140.15?

MR. KATZ: Yes; we have it in front of us, your Honor.

THE COURT: Okay. Because I'm going to take argument on that section as well.

So supposing we suspend until Mr. Malfer comes in.

MR. KATZ: All right.

MR. K JACOBS: Let me see if he has arrived, Judge. I have been calling.

THE COURT: Would you let me know? Because I have three lawyers waiting.

MR. JACOBS: I understand that.

(Whereupon Mr. Jacobs left the courtroom and returned shortly after.)

MR. JACOBS: Judge, he's not back. I'll go downstairs and see if—

THE COURT: Mr. Katz and Mr. Payton, I'm going to call Mr. Payton out again as soon as Mr. Malfer arrives. Would you stand by?

(Whereupon the hearing continued shortly thereafter, as follows:)

THE COURT: Are we ready on the hearing?

[119] MR. JACOBS: Yes.

THE COURT: Thank you very much, Mr. Malfer, for coming back. I know it was short notice.

THE CLERK: Indictment 1649 of 1970, People of the State of New York against Theodore Payton, charged with murder.

The defendant present with counsel. Mr. Burns, Mr. Katz and assistant district attorney Jacobs present.

THE COURT: You know, I have expanded the nature of the hearing before me to incorporate your application, counsel, to suppress tangible evidence allegedly recovered in the apartment of Mr. Payton.

There has been a concession by the district attorney with respect to ietems A and B set forth in his answering motion papers.

And so I think it might be necessary, Mr. Galloway, to swear the witness again.

THE CLERK: Yes, your Honor.

MAL MALFER, a former Detective of the Bond and Forgery Squad, New York City Police Department, now on terminal leave, called as a witness on behalf of the People, having been first duly [120] sworn by the Clerk of the Court, testified as follows:

THE COURT: As I say, thank you very much for coming back.

Mr. Jacobs.

MR. JACOBS: Thank you, Judge.

DIRECT EXAMINATION

BY MR. JACOBS:

Q. Detective Malfer, this is a continued hearing where your previous testimony left off.

MR. JACOBS: But we can incorporate the other testimony, your Honor.

Q. Detective Malfer, am I correct that you were the detective assigned to the investigation of the shooting of Roberto Carassas on January 12th, 1970?

THE COURT: Could you just give me the spelling of that last name? I had some trouble with it.

MR. JACOBS: Certainly, Judge. Let me get it.

C-a-r-a-s-s-a-s.

THE COURT: Thank you. All right.

Were you the detective assigned to investigate the shooting of Robert Carassas?

[121] THE WITNESS: Yes.

THE COURT: And on what day was the shooting, if you know?

THE WITNESS: January the 12th.

THE COURT: Was this a homicide?

MR. JACOBS: Yes.

BY MR. JACOBS:

Q. Well, Mr. Malfer, was that a homicide?

A. Yes, sir.

THE COURT: January 12th, 1970?

THE WITNESS: Yes, sir.

Q. And that was at a gas station; am I correct?

A. Yes.

Q. Located at 1995 First Avenue here in the City and County of New York?

A. Yes, sir.

Q. And you responded to the scene, Detective Malfer, sometime in the early morning; is that correct?

A. Yes.

Q. And from that time up until the morning of January 15th, some three days later, did you investigate this homicide?

A. I did.

[122] Q. Did you speak to various witnesses at the scene?

A. Yes, sir.

Q. Did you speak to witnesses who were not at the scene?

A. Yes, sir.

Q. And did there come a time on January 14th, 1970, that you learned the name of the alleged perpetrator of this murder?

A. Yes, sir, I did.

MR. BURNS: Can I caution Mr. Jacobs perhaps with respect to leading? Because we're—

THE COURT: Well, we are not at the apartment yet, and we want to get there, and I suppose leading is harmless at this point.

Did you learn the name of the alleged perpetrator?

THE WITNESS: Yes.

BY MR. JACOBS:

Q. And what date was that?

A. On January the 14th.

Q. And what name did you learn?

A. We learned the name Teddy Payton.

Q. And was that from conversation with wit- [123] nesses?

A. Yes, sir.

Q. Did you also learn the address?

A. Yes, sir.

Q. What address?

A. 682 East 141st Street, Apartment 5-C.

THE COURT: East 141st Street, apartment 5-C?

THE WITNESS: Yes, sir.

Q. Did there come a time, Detective Malfer, that you responded to that location?

A. Yes, sir.

Q. Would you tell us the date and the time that you responded, please?

THE COURT: When you say "responded," you mean went to that location?

MR. JACOBS: Went to that location.

THE WITNESS: May I go to my notes on this?

THE COURT: Yes.

Don't lead from this point on.

A. On January the 15th, 1970, approximately 7:30 A.M., I was assigned in company with Sergeant Hoarty.

Q. Sergeant who?

A. Hoarty, H-o-a-r-t-y. Detective Brady, Detective [124] Seffers, -S-e-f-f-e-r-s, and Detective McPartland, M-C P-a-r-t-l-a-n-d. Responded to 682 East 141st Street, Apartment 5-C.

Q. What happened when you got there?

A. A light could be seen from the bottom of the door, and I heard a radio—

MR. KATZ: Excuse me, Mr. Malfer.

I don't believe this witness should be reading from his notes. He may refresh his recollection if he has to, but I don't believe it's proper for him to be reading.

THE COURT: Well, if you recall tell us what you remember; if you are unable to recall you may look at your notes to refresh your recollection.

THE WITNESS: All right, Judge.

This is four and a half years ago, and I feel that I should go to my notes.

THE COURT: If you—

MR. BURNS: Well, that is what I wanted the record to reflect, your Honor, that if he cannot recall from his independent recollection let him state it for the record if he has to refresh his recollection by looking at his notes.

[125] THE WITNESS: I am able to recall without checking my notes that this situation existed. There were lights from underneath the door and there was a radio playing.

BY MR. JACOBS:

Q. What happened?

THE COURT: And the record will reflect that he testified to those facts without looking at his notes.

Q. What happened, Detective Malfer?

A. We then asked for assistance.

MR. BURNS: My problem with this, your Honor—I hate to be interrupting—I notice that Detective—former Detective Malfer, his eyes keep dropping down to his notes.

THE COURT: All right.

MR. BURNS: I would like the record to reflect each time that he has to refresh his recollection by looking at the notes, that the record should so reflect, that's all.

THE COURT: Okay.

What they're saying, Detective Malfer—

THE WITNESS: Yes.

THE COURT: —is that first listen to the [126] question.

THE WITNESS: Right.

THE COURT: To see if you can respond to the question without looking at your notes. If you are unable to do that then ask me for permission to look at your notes.

THE WITNESS: All right.

THE COURT: And then after looking at your notes, then you may testify from your recollection if your recollection has been refreshed.

THE WITNESS: All right.

THE COURT: If you can't do that we'll meet the problem some other way.

BY MR. JACOBS:

Q. Detective Malfer, did you or any of the other officers knock on the door?

A. Yes, we did.

Q. Do you recall who knocked on the door?

A. To my best recollection I couldn't say. Perhaps I did and others with me did.

Q. But you recall that someone knocked on the door?

A. Yes, sir.

Q. Was there a response?
[127] A. No.
Q. What happened then?
A. At that point we called on the Emergency—
THE COURT: Don't look at your notes now.
A. (Continuing) At that point we called on the Emergency Service to give us a hand with getting through the door.
Q. And did Emergency Service respond?
A. Yes, they did.
Q. And was the door subsequently broken into?
A. Yes, it was.
Q. And did you and the other officers enter the apartment?
A. We did.
Q. And was anyone in the apartment?
A. No, sir.
Q. What happened inside the apartment?
THE COURT: Don't look at your notes, please.
THE WITNESS: No, sir.
Q. What happened inside the apartment?
MR. BURNS: Perhaps he can close that book or whatever it is that he's reading from.
THE COURT: Well, let's try and do it my way.
MR. BURNS: All right, your Honor.

[128] BY MR. JACOBS:

Q. What happened inside the apartment?
A. We conducted a search of the apartment for the person whom we were seeking.
Q. That was Theodore Payton?
A. Yes, sir.
Q. And was he in the apartment at that time?
A. No, sir.
Q. Am I correct you had no search warrant at that time?
A. No, sir.
Q. You were responding to the apartment based upon information that you had from witnesses that you had spoken to?
MR. BURNS: I object to the leading.

THE COURT: Sustained.
MR. JACOBS: I'll withdraw the question.

[129] BY MR. JACOBS:

Q. Did you find certain property in the apartment that you took into your possession?
A. Yes, sir.
Q. Would you tell us what property you found, where the property was, please, Detective Malfer?
A. To the best of my recollection, as far as where the property was now, I recovered a shotgun which could have been in a closet. Whether it was a linen closet or clothes closet, at this point I cannot recall.
Also found a bandolier containing fourteen buckshots that go with the shotgun.
Also a thirty caliber shell casing.
Q. Where was that found?
A. That was on top of a bureau.
Q. Was it on top of a bureau or on top of a stereo?
MR. BURNS: I object to that.
THE COURT: Sustained.
THE WITNESS: At this point, I can honestly say—
THE COURT: The question has been objected to.

[130] BY MR. JACOBS:

Q. Yes, Detective Malfer?
A. I cannot honestly state whether it was on top of a stereo—
MR. BURNS: Objection. I don't understand—
THE COURT: I sustained the objection to the question and so the witness is—should not answer it.
You may put another question to him.

BY MR. JACOBS:

Q. Detective Malfer, referring to your notes that are already introduced into evidence or deemed marked into evidence—
THE COURT: Are these the same notes that were deemed marked at the other hearing?
MR. JACOBS: That's correct, sir.
THE COURT: They were marked, Mr.—We'll mark them again at this hearing.

MR. JACOBS: I should note, your Honor, when I say "marked", I'm referring to the specific page that he is making reference to, not necessarily the whole notebook which contains some fifty odd pages.

I have intentions, your Honor, as soon as Detective Malfer completes his direct testimony, [131] to turn a copy of that page over to defense counsel.

I have made a xerox—

THE COURT: Is this a page different from the one we had last time?

MR. JACOBS: Yes, sir.

THE COURT: This will be deemed. This will be deemed People's—The book was marked earlier in the hearing. It was a memo book which was marked 2 and the two page statement which contained the alleged—the two pages, rather, which contain the alleged statement of the defendant, was marked 3. So I suppose now we're talking about a different page?

MR. JACOBS: Correct, sir.

THE COURT: This could be deemed 4 at this point.

What is the number on your pages? Do you have a number?

THE WITNESS: It's not numbered.

THE COURT: All right, but the page which has to do with the search of the apartment is a page which is different than the other page which was introduced last time?

THE WITNESS: Yes.

[132] THE COURT: This will be deemed marked 4.

(Page of memo book deemed marked People's Exhibit 4 for identification.)

MR. BURNS: Before he testifies to it, may we know if it's going into evidence.

THE COURT: It hasn't been offered in evidence.

MR. BURNS: I thought he was going to offer it in evidence.

THE COURT: Marked 4 for identification.

Of course, you're going to have an opportunity to see it. I'll do it at the conclusion of the examination.

MR. BURNS: I just want to glance at it before he testifies from it.

I understood from—I'm sorry, I understood from his last question that he was referring to something which he stated that he thought had already been deemed, but it wasn't deemed and now we're talking about something different.

THE COURT: Just in order to satisfy your curiosity you can look at it now.

MR. JACOBS: Judge, it's not in evidence and it's his memo book and I object to it.

[133] There are other references which are there. Now we're getting to the point where we're just turning over things. I prepared a copy of this on Rosario, too.

THE COURT: Then your curiosity will be satisfied at a later time. It will be—

MR. BURNS: Just as long as when it goes into evidence—

THE COURT: You'll be able to look at it and make any appropriate objection.

I always like to do things in the fraternal way, if I can; if I can't, then I'll adhere to the rules.

MR. JACOBS: Thank you, Judge.

THE COURT: You bet.

BY MR. JACOBS:

Q. Detective Malfer, pertaining to your note book, will you tell us if it refreshes your recollection, using your notebook, where this thirty caliber Winchester casing was found?

A. May I use the—

THE COURT: Yes, indeed.

THE WITNESS: My note states—

THE COURT: Never mind what your note states.

[134] BY MR. JACOBS:

Q. Look at your notes and see if it refreshes your recollection, Detective Malfer?

A. Yes.

THE COURT: Having looked at it, what is your best recollection as to where the shell casing is?

THE WITNESS: On top of the stereo in the living room.

THE COURT: Okay. Now we're gotten over that.

BY MR. JACOBS:

Q. Was that in plain view, that casing?
A. Yes, sir.
MR. BURNS: I object to that.
THE COURT: Overruled.

BY MR. JACOBS:

Q. Was it in plain view, detective?
A. Yes, sir.
Q. Do you recall what, if any, other property was found, please?
A. Yes.
Q. Besides the property you have already described?
A. I've described a shotgun and the shells that went with this.
[135] Also found was a sales receipt.
Q. For what type of gun?
A. For a thirty caliber Winchester and other items on such sales receipt.
Q. Was that sales receipt for the shotgun—for a shotgun or for a Winchester, Detective Malfer?
A. For a Winchester.
Q. Is that your best recollection of it?
A. Yes, sir.
Q. And was any other property found?
A. Several photographs.
Q. Where were they found, if you recall?
A. Again, to the best of my recollection, possibly in one of the drawers or on top of a bureau.
I cannot say for sure at this point.
MR. JACOBS: Your Honor—
THE COURT: Did you take this thirty caliber casing with you?
THE WITNESS: Yes, sir.
THE COURT: And did you take with you the other items that—to which you have just testified, the thirty caliber Winchester rifle and several photos?
THE WITNESS: Yes.
THE COURT: Was it a rifle or a shotgun?
[136] THE WITNESS: It was a shot gun.

THE COURT: Shotgun and several photos?
THE WITNESS: Yes.
THE COURT: Okay.
Is there something else?
MR. JACOBS: No, sir, Judge.
I prepared a xeroxed copy of Detective Malfer's memo book with respect to the entry into the defendant's apartment.
Perhaps we should have the memo book brought over so that Mr. Katz and Mr. Burns can compare the xerox that I have made at their convenience with the memo book.
THE COURT: Okay, do that. Give it to Mr. Jacobs so he can handle it the way he wants to.

(Handing to Mr. Katz and Mr. Burns.)

MR. JACOBS: Return the detective's memo book.

(Handing to the witness.)

MR. JACOBS: The record should indicate Mr. Katz and Mr. Burns had an opportunity to compare the memo book with the xeroxed copy that I gave them.
THE COURT: Okay.
[137] At the last hearing I noticed that two-page statement, Exhibit 3, which reflected the defendant's statements made to Mr. Malfer, was not offered in evidence.
MR. JACOBS: No, sir.
I would only be able to offer it into evidence—The People would be, as a past recollection recorded, which was not done either with that exhibit or with this exhibit.
I think the purpose of marking them and everything was more for Rosario material having been turned over to defense than actually as an exhibit into evidence.
MR. KATZ: Your Honor, I think we can safely have them marked in evidence for the purpose of this hearing.
MR. JACOBS: Yes, I have no objection to that.

THE COURT: Then why don't we consider those items heretofore marked for identification as being in evidence, but only for the purpose of this hearing.

MR. KATZ: Okay.

THE COURT: And this ruling incorporates all past exhibits on April 26th marked for identification [138] as well as any exhibits marked for identification today.

The offer into evidence, or the receipt into evidence, is solely for the purpose of this hearing.

THE CLERK: That would be People's 1, 2, 3 and 4, your Honor.

THE COURT: Right.

MR. JACOBS: Judge, I hate to be picayune, the whole book should not be in evidence.

THE COURT: No, just the particular pages involved.

MR. BURNS: I'm sorry, is—2 is really only for identification.

THE COURT: 1, 3 and 4; okay.

MR. JACOBS: Thank you, Mr. Burns.

THE COURT: 1, 3 and 4 then; that's quite correct.

All right, the book itself has been marked for identification except for those pages received in evidence.

(People's Exhibits 1, 3 and 4 for identification now received in evidence.)

THE COURT: Are you ready to examine Mr. Malfer? Let's go, gentlemen.

[139] MR. JACOBS: I followed your Honor's suggestion and xeroxed up several copies of the memo book.

THE COURT: It's always helpful.

Can we move ahead, please?

MR. KATZ: Yes, one moment, your Honor.

THE COURT: Can we go ahead now, please?

MR. KATZ: Yes, your Honor.

CROSS EXAMINATION

BY MR. KATZ:

Q. Mr. Malfer, you told us on direct examination that you had learned the name of the alleged perpetrator on January 14, 1970; is that correct?

A. Yes.

Q. And that his name was told to you by witnesses that his name was Teddy Payton?

A. Yes.

Q. And you also were told where Teddy Payton lived; is that correct?

A. Right.

Q. And all of this on January 14, 1970; is that correct?

A. Correct.

Q. Now, when you learned that, sir, did you do [140] anything—make any efforts whatsoever to obtain a search warrant for Mr. Payton's apartment?

A. To the best of my recollection, no.

Q. Was there an arrest warrant issued for Mr. Payton on January 14, 1970?

A. No.

Q. January 15, 1970?

A. No.

Q. Now, you went to Mr. Payton's apartment at 682 East 141st Street, in the Bronx, on the—about seven-thirty on the 15th of January, 1970; is that correct?

A. Yes, sir.

Q. And you went there with several other detectives whose names you gave us; is that correct?

A. Yes, sir.

Q. Did anyone have an arrest warrant for Mr. Payton, to your knowledge?

A. No, sir.

Q. There was no arrest warrant?

A. No, sir.

Q. And it was after, was it not, Detective Payton—Detective Malfer, it was after you went to the defend-

ant's apartment that an alarm went out for his arrest; isn't [141] that correct?

A. May I recollect with these notes on that?

THE COURT: Yes, you may, surely.

THE WITNESS: Right.

Yes, that is correct.

BY MR. KATZ:

Q. Indeed, I believe you told us at the hearing a few weeks ago that the alarm went out at 11:15 a.m. on January 15, 1970; is that correct?

A. That is correct.

Q. What time did you leave the defendant's apartment on that date? Do you recall?

A. I do not recall that.

Q. It was prior to 11:15 a.m.; was it not?

A. I jwould safely say so.

Q. And it was after you left the apartment that you or someone in your company caused the alarm to be issued; isn't that correct?

A. Correct.

Q. And would it be fair to say, sir, that that alarm went out based on what you found at that apartment?

MR. JACOBS: Objection to the question.

THE COURT: Sustained.

BY MR. KATZ:

[142] Q. Can you tell us, sir, why an alarm had not gone out prior to 11:15 a.m. on January 15, 1970?

MR. JACOBS: Objection.

THE COURT: Sustained.

BY MR. KATZ:

Q. All right. In any event, you had neither an arrest warrant or search warrant, is that correct, when you went to the premises on January 15, 1970?

A. That's correct.

Q. Now, there was yourself, a Sergeant Hoarty, Detective Brady, Detective Seffers and Detective McPartland; is that correct?

A. Correct.

Q. You all went there in one car?

A. I can't recall if it was one or two cars.

Q. And you went to the apartment; is that correct?

A. Correct.

Q. Was anyone on the roof? Did any one of you go to the roof?

A. At this point I couldn't be quite sure. But this is possible.

Q. Was there a stakeout of any sort at that time?

A. At the apartment?

Q. Yes, sir.

[143] A. No, sir.

Q. All of you went to the door?

A. I can't say if all of us went to the door, no.

Q. What unit was Sergeant Hoarty attached to?

A. He was my sergeant; the 23rd Squad.

Q. From the 23rd Squad?

A. Right.

Q. And Detective Brady?

A. From the 23rd Squad.

Q. Detective Seffers?

A. Manhattan North Homicide Squad.

Q. And Detective McPartland who was from Manhattan North Homicide as well; is that correct?

A. Correct.

Q. Now, you went to the door; is that correct?

A. Correct.

Q. All five of you, as you recall?

A. As I said before, I cannot recall if it was all five or whether we did disburse some of the men elsewhere.

Q. Sir, you were at the door?

A. Oh, yes.

Q. Did you have your gun drawn?

A. I can't recall that.

Q. Do you recall whether any of the other officers [144] had their guns drawn?

A. Not at the moment, no.

Q. Now, prior to arriving at the apartment, had you made any attempt to ascertain whether the defendant was there?

A. That I can't recall.

Q. Now, you looked through the keyhole, did you, Mr. Malfer?
A. I don't recall that either.
Q. Did you look under the door?
A. There was light shining from underneath the door.
Q. There was a light shining?
THE COURT: "From underneath the door."

BY MR. KATZ:

Q. This is seven something in the morning?
A. Seven-fifteen in the morning.
Q. And the door was locked, was it not?
A. Yes, it was locked.
Q. And you hears some music coming through?
A. Yes, sir.
Q. Was it loud?
A. Loud enough for us to hear.
Q. Did you secure the apartment, in any event?
MR. JACOBS: I object.
[145] THE COURT: Did you what?
MR. KATZ: Secure the apartment.
THE COURT: What do you mean by that?
MR. KATZ: Well, place a guard there.
THE WITNESS: After we entered the apartment?
MR. KATZ: Yes.
THE WITNESS: To the best of my knowledge, I believe we did.

BY MR. KATZ:

Q. All right, let's get you in the apartment first. You knocked on the door and there was no response; is that correct?
A. Right.
Q. And then what happened?
A. Well, after making—Well, after trying to gain entry by calling to the attention if someone would answer the door, we then called for Emergency Service.
MR. BURNS: I'm sorry, I didn't hear him.
THE COURT: "After trying to get entry, we called for the Emergency Service."

BY MR. KATZ:

Q. Well, didn't you try to force entry yourself?
A. No, sir.
Q. Weren't you concerned that the person you were [146] coming to visit might get out the fire escape while you were calling Emergency Service?
A. Well, there, again, I repeat, we're going back a long time.
I assume if we worked the way we normally worked, that we had that situation covered.
Q. Well, did anyone go up to the roof?
A. I cannot recall who went to the roof.
Q. Someone went and made a telephone call or radio call to Emergency Service? Is that correct?
A. That's correct.
Q. And no one in your party attempted to get through the door; is that correct?
A. No, sir.
Q. And no one attempted to get in through a fire escapt, if there was one?
A. No, sir, not at that time.
Q. How long did you wait at the door before Emergency Service came?
MR. JACOBS: Judge, I'm going to object.
I don't see the relevancy of this line of questioning.
THE COURT: I suppose it has to do with whether or not the officer wanted to utilize, as the statute [147] seemingly permits him to, utilize entry.
I suppose the point of Mr. Katz is, if they really wanted to get the defendant, they wouldn't have called Emergency Service.

BY MR. KATZ:

Q. How long were you waiting there?
THE COURT: It bears on the factual issue here.
THE WITNESS: How long were we waiting for Emergency Service?

BY MR. KATZ:

Q. Yes.
A. I can't recall.

Q. Was it more than five minutes?
A. I don't recall.
Q. More than a half-hour?
A. I can't recall.
THE COURT: Do you recall the nature of the door, was it of wood or anything else?
THE WITNESS: The door, to the best of my recollection, was of metal.
And the reason why we would have to call Emergency Service was because the door was such a problem to us, we couldn't handle it alone. This is [148] why we were called in.

[149] BY MR. KATZ:

Q. What attempts did you make to get into the door?
A. There again I can recall trying to force the door ourselves, but we were not equipped with the proper tools.
Q. Did you have a gun?
A. Did I have a gun?
Q. Yes.
A. Yes, I had a gun.
Q. To your knowledge, did the other officers with you have guns?
A. Every officer is armed.
Q. There came a period of time that Emergency Service responded; is that correct?
A. Correct.
Q. And how was entry through the door obtained?
A. They forced the door open.
Q. With a jimmy of some sort, axe?
A. Whatever tools they have.
Q. They smashed the door down?
A. They opened the door, yes.
Q. How? What did they do?
A. They forced the door open.
Q. With what?
A. Whatever tools they had at their disposal.
[150] Q. Do you remember?
A. I don't remember.
Q. Were you there?
A. Yes.

Q. When you say they forced the door, did they break into the apartment?
THE COURT: Well, that's a conclusion that one could draw.
Q. Did they huse a hammer or axe—
THE COURT: Please. That's a conclusion that one can draw from having a door forced open.
Q. Do you have any recollection at all, Mr. Malfer?
A. I can recall crowbars.
Q. You can recall crowbars?
A. Yes.
Q. Do you recall crowbars being used?
A. Yes.
Q. And you you recall the door collapsing after the crowbars were used?
A. I recall the door being opened.
Q. Then you walked in; is that right?
A. Correct.
Q. Where was the light?
THE COURT: Do you recall where the lights were [151] at that time?
THE WITNESS: To the best of my recollection, I believe the entry was a slight hallway prior to entering a room. As to where the light was shining from at this point I can't say. It could very well have been from the ceiling or from a lamp. I cannot recall at this point.

BY MR. KATZ:

Q. You have no present recollection?
A. No, sir.
Q. You got into the apartment. How many rooms? Do you recall how many rooms there were in that apartment?
A. Not at the moment, no, sir.
Q. And there were how many? There was you. There were five of you, is that correct, five detectives?
A. Plus the Emergency Service.
Q. How many Emergency Service men were there, do you recall?
A. I believe there were two.

Q. Where did you go upon gaining entrance to the apartment?
A. Seached the apartment, checked the rooms.
Q. Well, how many rooms were there? I beg your pardon?
[152] Q. How many rooms?
A. I repeat, I do not recall.
Q. Was it a large apartment?
A. No.
Q. Small?
A. To the best of my recollection.
Q. How long did it take you to search the apartment?
A. That I can't recall.
Q. What were you searching for?
A. At that moment, we were searching for Mr. Theodore Payton.
Q. All eight of you, approximately; is that correct?
A. Whatever number was there.
Q. Well, there were five detectives and two or three Emergency Services people?
A. Yes.
Q. That makes about eight, doesn't it?
MR. JACOBS: Seven.
Q. Seven or eight. Divided up, go into different rooms?
A. I assume they did, yes.
Q. Not assume. What did you do?
A. I would take it for granted.
Q. Don't take anything for granted. What did you do?
[153] THE COURT: Excuse me.
If you can't remember, say you don't remember, and we'll go on from there.
A. I don't remember.
Q. Do you remember how long you were in the apartment that morning?
A. I don't remember.
Q. What was the first thing you did when you got in the apartment?
A. Started a search of the apartment.

Q. Where did you search?
A. I don't recall.
Q. Did you search under the bed?
A. We searched every place.
Q. Did you search in a drawer for Mr. Payton?
A. No, we didn't search in a drawer for Mr. Payton.
Q. You did open drawers, did you not?
A. Yes.
Q. You opened closets?
A. Yes.
Q. You took out the contents of drawers, did you not?
A. Yes.
Q. Did you have envelopes with you, Property [154] envelopes?
A. Did we have Property? No, we did not.
Q. You searched cupboards?
A. Yes.
Q. Where else did you search?
A. I would say we searched the whole apartment.
Q. Was there a mattress?
A. Yes.
Q. Did you tear the mattress apart?
A. Didn't tear it apart, to my recollection. But we did search under it.
Q. In other words, would it be fair to say, Detective, that you ransacked that apartment?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. You weren't looking for Mr. Payton in the cupboard, were you?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. Did you expect to find Mr. Payton in a bureau drawer?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. You were searching the apartment, were you not?
[155] A. Yes.
Q. For property, were you not?
MR. JACOBS: Objection.

THE COURT: Sustained.
Q. Were you searching for items of evidence?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. What were you searching for?
A. Mr. Payton.
Q. In a dresser?
MR. JACOBS: Objection.
THE COURT: Sustained.
Q. You did open dressers, did you not?
A. Yes.
THE COURT: He already testified he opened drawers, he opened cupboards, he opened closets, and that he went in there looking for Mr. Payton. What conclusion should be drawn, the Court can draw.
Q. Now, you told us that you found, is that correct, did you find a shotgun in a closet?
THE COURT: Was it you who found the shotgun?
THE WITNESS: I did, yes, sir.
Q. Did you take any other items from that closet?
[156] A. I believe the bandoleer with the shotgun shells was also there.
Q. Where in the closet was the bandoleer, Mr. Malfer?
A. I can't recall that.
Q. Where in the closet was the shotgun?
A. Also, I can't recall that.
Q. In what room was the closet located?
A. Can't remember.
THE COURT: Is it necessary to go into, in your examination, so much detail in view of the concession of the district attorney that these items were seized illegally?
Q. To your knowledge, Mr. Malfer, were you the only one who in that party removed any items from that apartment that morning?
A. To the best of my recollection, I was the one who found the items mentioned.
Q. And to the best of your recollection, no one else removed anything from that apartment; is that correct?
A. To the best of my recollection, yes, sir.

Q. Now, did you find the shotgun first or did you find the photos first?
A. Would you repeat that?
[157] Q. Did you find the shotgun first or did you find the photos of the defendant?
THE COURT: Is that really relevant here, in view of the concession?
What we're really concerned with on this yearing you know, is the issue pertaining to the alleged seizure of the .30 calibre casing.
MR. JACOBS: Correct, sir.
THE COURT: The officer has been in the apartment. It's conceded there was no warrant either for the arrest or for the search.
MR. KATZ: Your Honor, I think it really bears on his credibility.
THE COURT: Many things go to credibility, but if we're not to draw the line, then you can go down to infinite detail, which I don't think is warranted.
MR. KATZ: May I have just that one question?
If he found the Winchester rifle first, of the various items you say you found that morning?
MR. JACOBS: Objection. He didn't find a Winchester rifle. He found a Winchester shotgun.
THE COURT: Is that the item you found first?
THE WITNESS: That I can't recall.
THE COURT: Okay. Next question.

[158] BY MR. KATZ:

Q. Where was the living room located with respect to the doorway?
A. I repeat, this I can't place in my mind.
Q. Was there a light on in the living room when you entered?
A. There was a light. As to where the light was coming from, I cannot remember.
Q. And did you find this .30 calibre Winchester casing, you personally?
A. Yes, sir.
Q. You personally?
A. To the best of my recollection, it was I, yes.

Q. And when did you find it in point of time after entering the apartment?

THE COURT: You mean how long after he entered the apartment?

Q. Yes.

A. I can't recall how long, no, sir.

Q. Was it sort of standing up like a trophy on top of a stereo set?

MR. JACOBS: Objection.

THE COURT: Sustained.

Q. Where was it located?

[159] A. On top of the stereo in the living room.

Q. Standing up?

A. This I can't recall.

Q. Did you come upon it as soon as you entered the apartment?

A. No, I don't believe I came upon it as soon as I entered the apartment. I can't recall exactly when I spotted it. But I can't say it was as soon as I entered the apartment.

Q. Were the other officers searching the apartment while you were searching?

A. Yes, sir.

Q. And they were searching the living room as well?

A. The whole apartment.

Q. There were only three rooms there, weren't there, Detective?

A. I don't recall how many rooms there were.

Q. But you distinctly remember seeing that casing; is that correct?

A. Yes, sir.

Q. When you found that casing, Detective, were there other officers in that living room?

A. I can't recall that.

Q. What did you do with it when you found it?

[160] A. I brought it back with me.

Q. Where did you put it?

A. I brought it to the 23rd Precinct.

Q. Was this a rifle casing?

A. Yes, sir

Q. Now, were there any other items in plain view in the living room?

MR. JACOBS: Objection.

THE COURT: Sustained.

Q. Can you describe for us what was contained in the living room, furniture?

A. Furniture?

Q. Yes, whatever. Tell us what was there?

A. No, I cannot recall that, no.

Q. Do you recall a stereo set?

A. No.

Q. You don't recall a stereo set?

A. No.

Q. Do you recall a casing sitting on top of a what?

A. Of a stereo set.

Q. I thought you just told us you don't recall the stereo set?

A. I assumed you were asking a description of the stereo set.

[161] Q. No, no. Is that the only item of furniture or any other furnishing that you recall in that apartment, is a stereo set?

A. I made a notation that this was found on top of a stereo set.

Q. But do you have any independent recollection as you sit there now about any other item of furniture or furnishing that was in that apartment?

MR. JACOBS: Objection.

THE COURT: Overruled.

A. Not at this moment.

Q. At any moment. Did you have any a year ago?

MR. JACOBS: Objection.

THE COURT: Sustained. Anything else?

MR. KATZ: Yes, your Honor.

Q. Do you recall, Mr. Malfer, when on January 14, 1970 you first learned of where Mr. Payton lived?

MR. JACOBS: Objection, Judge.

THE COURT: Sustained.

Q. Did you go to that apartment building on January 14, 1970 looking for the defendant?

A. At this moment I can't recall whether we did or not.

Q. Well, looking at Exhibit 2, your book, see if that refreshes your recollection.

[162] THE COURT: Would you do that, please.

THE WITNESS: Surely.

A. I have a notation here.

THE COURT: Just bear with me a moment.

A. I have a notation—

THE WITNESS: Can I use my notes?

THE COURT: Yes.

A. That on January the 14th, 1970, the house where Teddy lived—

Q. Mr. Payton?

A. 682 East 141st Street, top floor was pointed out to me.

[163] BY MR. KATZ:

Q. Was it pointed out to you?

A. Yes.

Q. While you were in that—you were right there in the building, is that right?

A. Yes.

Q. Did you do anything to effect arrest on that date of Mr. Payton?

A. I beg your pardon?

THE COURT: Did you do anything on January 14th—

Q. To effect the arrest of Mr. Payton.

A. No, sir, I did not.

Q. You did not?

A. No.

Q. And you had all the information then, you tell us, that is, on January 14th, 1970, that you had the following day; is that correct? There was nothing added to your knowledge to effect the arrest on the 15th, isn't that true?

MR. JACOBS: Objection, Judge.

THE COURT: Sustained.

Q. Did you make any effort to obtain an arrest warrant on January 14th, 1970?

[164] MR. JACOBS: Objection, Judge.

THE COURT: Is it conceded, Mr. Jacobs, that at no time up until the time of entry in the apartment no effort was made to either—to obtain either a search warrant or an arrest warrant?

MR. JACOBS: That is correct, sir.

THE COURT: So why do we have to go into it?

BY MR. KATZ:

Q. All right. Now, were you told, Mr. Malfer, by any of these witnesses when Mr. Payton would be at home?

MR. JACOBS: Objection.

THE COURT: Sustained.

MR. KATZ: All right.

Q. Now, on January 16, 1970, you questioned Mr. Payton at the 23rd Squad; is that right?

THE COURT: I think there was testimony he came in on that day.

MR. JACOBS: Yes.

(Witness peruses notes.)

A. Yes.

Q. All right.

Now, prior to your interrogating Mr. Payton on the 16th of January, 1970, you had been to his apartment [165] and had taken out these various items that we've discussed here today; is that correct?

A. Yes.

Q. All right. Specifically you had taken out a .30 caliber Winchester rifle casing; is that right?

A. Yes, sir.

Q. Now, on the 16th of January, 1970, you questioned Mr. Payton about a .30 caliber Winchester rifle, did you not?

A. Yes, sir.

Q. Where was that casing located when you physically located it when you questioned Mr. Payton?

MR. JACOBS: Objection.

THE COURT: Sustained.

Q. Now, when you took that .30 caliber casing you had knowledge, had you not, that the decedent was killed with a .30 caliber Winchester; is that correct?
A. That's correct.
Q. You learned that on the 12th I assume; is that right?
A. It's possible, yes.
Q. Well—
THE COURT: You learned it sometime after you [166] were assigned to investigat the case?
THE WITNESS: Yes.

BY MR. KATZ:

Q. Certainly before the 15th of January you knew that; is that correct?
A. Yes.
Q. All right.
And when you questioned Mr. Payton did you show him the casing?
MR. JACOBS: Objection.
I think we've had this testimony, what was said and what was not said.
THE COURT: Yes. Do you want to go into the hearing again?
MR. KATZ: Well, I thought—
THE COURT: Because we covered it rather comprehensively last time, and in evidence are the two pages, People's 3, and that reflects what was done at the time.
Now, you were rather comprehensive in your cross-examination, Mr. Katz, I can assure you from my own notes.
MR. KATZ: May we have three minutes or so?
[167] THE COURT: Three minutes for a recess?
MR. KATZ: Yes, please.
THE COURT: Sure thing.

(Whereupon, a short recess was declared by the Court.)

AFTER RECESS
HEARING CONTINUED

(Mr. Jacobs, Mr. Katz, Mr. Burns and the defendant are present.)

DET. MAL MALFER, having been previously duly sworn, resumed the stand and testified further, as follows:

THE COURT: All right; did that do it, Mr. Katz?
MR. KATZ: Yes, your Honor, I believe so.
THE COURT: All right.
MR. JACOBS: I just have maybe one question.
THE COURT: One question?
MR. JACOBS: One brief question.

REDIRECT EXAMINATION

BY MR. JACOBS:

Q. Detective Malfer, you said you spoke to several witnesses before you went to Mr. Payton's [168] apartment; is that correct?
A. Yes, sir.
Q. Was one of those witnesses at the scene on January 12th, 1970?
MR. BURNS: I object.
THE COURT: Sustained.
MR. JACOBS: I'll withdraw the question.
THE COURT: There were two questions, and you are withdrawing each of them?
MR. JACOBS: Yes.
THE COURT: Okay.
Does that complete the hearing? Both sides rest?
MR. KATZ: Yes, your Honor.
We would request some time to submit a memo.
THE COURT: All right.
MR. KATZ: Memorandum of law.
THE COURT: Very well.
MR. KATZ: With respect to the suppression, the third item, item C.

THE COURT: How much time do you want? It's an interesting question. A week?

MR. KATZ: One week I guess.

SUPREME COURT
TRIAL TERM
NEW YORK COUNTY

June 4, 1974

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

v.

THEODORE PAYTON, DEFENDANT

DECISION OF SUPREME COURT, NEW YORK COUNTY ON MOTION TO SUPPRESS

HAROLD BIRNS, J. The defendant moves for an order suppressing certain items taken by the People from his apartment.

At a hearing on this motion the sole witness was Detective Malfer. He testified that on January 12, 1970 at 8:40 A.M. a robbery occurred at a gas station at 1895 First Avenue and the manager was shot and killed. Detective Malfer was assigned to this case on that day. On January 14, 1970, as a result of information obtained from eyewitnesses at the scene of the crime and other information presented to him, he learned the name of the defendant as the person who allegedly committed the crime. He also learned of defendant's address.

On January 15, 1970, at approximately 7:30 in the morning, Detective Malfer and five other police officers and detectives went to the defendant's apartment. Detective Malfer knocked on the door but there was no answer. However, the detective noticed a light coming from under the door and heard the radio playing. The detective attempted to open the door, which was constructed of metal, without success. The Police Emergency Services Division was summoned to open the door by force, which was accomplished. Upon entering the apartment, the police officers did not find the defendant. However, in their search of the apartment the police con-

fiscated a Winchester shotgun with 14 shells, found in a closet. Also seized were three photos of defendant in a ski mask and a bill of sale for the shotgun, found in a drawer. Detective Malfer also seized a .30 calibre Winchester casing, which lay on top of the stereo in the living room in "plain view."

The police had neither an arrest nor search warrant at the time they entered the apartment. The District Attorney, however, asserts the presence of the police in the apartment was legal. Accordingly, the District Attorney maintains that the .30 calibre Winchester casing allegedly seen on the top of the stereo was in "plain view" and should not be suppressed. He concedes, however, that the items found in the closet and drawer should be suppressed.

At the time in question, January 15, 1970, the law applicable to the police conduct related above was governed by the Code of Criminal Procedure. Section 177 of the Code of Criminal Procedure as applicable to this case recited: "A peace officer may, without a warrant, arrest a person * * * 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." Section 178 of the Code of Criminal Procedure provided: "To make an arrest, as provided in the last section [177], the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused amittance."

It is abundantly clear from Detective Malfer's testimony that a homicide had been committed, and the police had reasonable cause to believe that the defendant had committed the felony.

Although Detective Malfer knocked on the defendant's door, it is not established that at this time he announced that his purpose was to arrest the defendant. Such a declaration of purpose is unnecessary when exigent circumstances are present (*People* v. *Wojciechowski*, 31 AD2d 658; *People* v. *McIlwain*, 28 AD2d 711).

"Case law has made exceptions from the statute or common-law rules for exigent circumstances which may allow dispensation with the notice * * * It has also been

held or suggested that notice is not required if there is reason to believe that it will allow an escape or increase unreasonably the physical risk to the police or to innocent persons". (*People* v. *Floyd*, 26 NY2d 558, 562.)

The facts of this matter indicate that a grave offense had been committed; that the suspect was reasonably believed to be armed and could be a danger to the community; that a clear showing of probable cause existed and that there was strong reason to believe that the suspect was in the premises being entered and that he would escape if not swiftly apprehended. From this fact the court finds that exigent circumstances existed to justify noncompliance with section 178. The court holds, therefore, that the entry into defendant's apartment was valid.

There is also no lack of cases to substantiate the People's argument that any evidence in plain view might properly be seized (*Ker* v. *California*, 374 US 23; *Coolidge* v. *New Hampshire*, 403 US. 443; *People* v. *Ball*, 41 AD2d 689). The observation of the shell casing, under the circumstances, was inadvertent.

The court rules that the Winchester shotgun, serial number 085194, and a bandolier with 14 shells found in a closet, and the three photos of the defendant in a ski mask, and a bill of sale for the shotgun found in a drawer are suppressed. The court finds, however, that the .30 calibre Winchester casing found in plain view should not be suppressed.

ORDER OF AFFIRMANCE OF THE APPELLATE DIVISION, FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 16, 1976.

Present—Hon. Theodore R. Kupferman,
Justice Presiding,
Vincent A. Lupiano
Louis J. Capozzoli
Myles J. Lane, Justices.

3741

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

—against—

THEODORE PAYTON, DEFENDANT-APPELLANT

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court. New York County (McQuillan, J.) rendered on October 29, 1974, convicting him of the crime of felony murder, and said appeal having been argued by Mr. Elliott Schnapp of counsel for the appellant, and by Mr. Henry J. Steinglass of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

Clerk

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Chronological List of Important Dates

Riddick v. *New York* (No. 78-5421)

April 16, 1974: Indictment filed.

April 25, 1974: Appellant arraigned in Supreme Court, Queens County—enters plea of not guilty.

May 3, 1974: Appellant moves to suppress physical evidence.

June 13, 1974: Hearing on motion to suppress physical evidence.

July 15, 1974: Motion to suppress evidence denied.

August 19, 1974: Appellant withdraws plea of not guilty and enters plea of guilty to criminal possession of a controlled substance in the sixth degree.

September 24, 1974: Appellant sentenced to 2½ to 5 years imprisonment.

March 28, 1977: Judgment of conviction affirmed without opinion by the Appellate Division, Second Department, one Justice dissenting.

July 11, 1978: Conviction affirmed by New York Court of Appeals by vote of 4-3.

September 14, 1978: Notice of appeal to United States Supreme Court filed.

Indictment For
Crim. Poss. of Cont. Sub. 5th Deg.
Crim. Poss. Hypo. Inst.

SUPREME COURT
CRIMINAL TERM
QUEENS COUNTY

No. 8072-74

[Filed April 16, 1974]

THE PEOPLE OF THE STATE OF NEW YORK

against

OBIE RIDDICK, DEFENDANT

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE committed as follows:

The defendant, above named on or about March 14, 1974 in the County of Queens, State of New York, knowingly and unlawfully possessed and had under his control a quantity of a dangerous drug, to wit, a quantity of heroin of an aggregate weight of more than one eighth of an ounce.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant of the crime of CRIMINALLY POSSESSING A HYPODERMIC INSTRUMENT, committed as follows:

The defendant, aforenamed on or about March 14, 1974 in the County of Queens, State of New York, knowingly and unlawfully posssesed a hypodermic syringe or hypodermic needle.

/s/ [Illegible]
District Attorney

[3]

SUPREME COURT, QUEENS COUNTY

SUPPRESSION HEARING TRANSCRIPT

* * * *

(At this point Assistant District Attorney Donald Feldman appears with Assistant District Attorney Richard Wagner on behalf of the People.)

COURT CLERK MANCHER: Page 3, number 3; indictment 8072.

THE COURT: Hearing to suppress physical evidence. Obie Riddick.

[4] Mr. Nathaniel Welkes of the Legal Aid Society is present, and for the defendant Obie Riddick, and Mr. Richard Wagner for the People.

COURT CLERK MANCHER: Obie Riddick. Are you Obie Riddick?

THE DEFENDANT: Yes.

COURT CLERK MANCHER: Is Nathaniel Welkes, present, your attorney?

THE DEFENDANT: Yes.

THE COURT: Call your first witness.

MR. FELDMAN: People call Detective Bisogno.

(The first witness takes the stand and is duly sworn before the Court.)

COURT OFFICER: People call Detective Fred Bisogno, shield number 2732; assignment 112 P.I.U.

FRED BISOGNO, a detective, having been called as a witness on behalf of the People, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FELDMAN:

Q. Detective Bisogno, how long have you been a member of the New York City Police Department?

A. Ten and a half years.

Q. And how long have you been a detective?

[5] A. Five years.

Q. And to which unit are you assigned now?
A. Presently I am assigned to the 112 Precinct Investigating Unit.
Q. Were you assigned to another unit previous to that?
A. Yes.
Q. Which?
A. 17th District Robbery Squad.
Q. Up until what time were you working with the Robbery Squad?
A. Until October of '73.
Q. Now, I call your attention to the date of March 14th, 1974, at about 12:00 noon, at 127-08 165th Street, in the County of Queens.
Did you have occasion to arrest the defendant, Obie Riddick?
A. Yes, sir, I did.
Q. And why did you arrest him?
A. I had gone there to arrest him for a robbery charge.
Q. Can you tell us briefly if you had any information connected with the defendant whereby he committed these robberies?
[6] MR. WELKES: I will object to that.
THE COURT: Sustained.
MR. FELDMAN: Your Honor, I think the C.P.L. would allow hearsay to establish a material fact.
THE COURT: You went there to arrest him, is that it?
THE WITNESS: Yes.
THE COURT: This is a motion to suppress the evidence. He went there to arrest him on another charge.

BY MR. FELDMAN:

Q. Who were you with on this occasion?
A. Detective Ferrick (Phonetic spelling), Detective Burnside, and Parole Officer Tinner (Phonetic spelling).
THE COURT: A parole officer?
THE WITNESS: Yes, sir.
THE COURT: Was the defendant on parole at the time?

THE WITNESS: I believe he was. I don't know.
THE COURT: What was the parole officer doing there if he was not on parole?
THE WITNESS: He came to assist us.
[7] THE COURT: I sure don't understand that.

BY MR. FELDMAN:

Q. When you arrived at this address—by the way, what sort of building is this address?
A. It's a two-family wood frame house.
Q. Tell us briefly what happened when you arrived at that address?
A. I knocked at the defendant's door, which was then opened by, I believe, the defendant's son; a three-year old male Negro opened the door.
Upon the door being opened, I was able to look into a bedroom where I saw the defendant seated in bed with the sheet waist high.
I then walked in, announced my authority, asked him if he was Obie Riddick. He said yes. And I told him he was under arrest, and I then informed him of his rights.
THE COURT: You actually arrested him on these other charges?
THE WITNESS: Yes.
Q. Had you informed him he was under—when you informed him he was under arrest, where was he?
A. He was lying in bed in a sitting up position.
Q. How much of his body was visible to you at [8] the time?
A. Half his body.
Q. Were his hands visible to you at that time?
A. No, they were not.
Q. Why not?
A. They were under the sheet.
Q. And after you informed him he was under arrest, what happened then?
A. I asked him to get out of bed, take his hands out from under the sheet and get out of the bed, at which time he did.

He was standing before me clad in Jockey shorts, only.

I searched the bed area, mattress, under the pillow, and I also searched a chest of drawers approximately two feet from the bed, at which time this contraband was discovered.

Q. Where was the contraband discovered?

A. It was discovered in the drawer in this chest of drawers I had searched.

Q. How many drawers were in this chest?

A. I don't recall. Approximately four or five.

Q. Which drawer was this?

A. Top drawer.

[9] Q. And could you describe for us in a little more detail where the dresser stood with relation to the bed?

A. In width, the dresser was approximately two feet from the bed; say about the center of the bed.

Q. And on which side was it?

A. Facing the bed, or facing toward the headboard, it would be on the right side.

Q. What did you find in the drawer?

A. I found a quantity of narcotics, narcotic instruments, syringes of that type, spoons.

Q. What did you do with those items?

A. They were vouchered at the 112 Precinct.

Q. And did there come a time in the regular course of business when you received laboratory reports on these items?

A. Yes, I did, sir.

Q. Can I see them? Do you have another copy of the lab report with you?

MR. FELDMAN: At this time I offer as People's Exhibit 1 the lab reports.

THE COURT: Mark it People's 1.

Do you have the parole officer here?

MR. FELDMAN: Not yet.

[10] MR. WELKES: No objection for the purpose of the hearing, as to either the evidence or the lab reports.

THE COURT: Was the parole officer present?

THE WITNESS: I believe he was in an adjoining room.

COURT OFFICER: People's Exhibit 1 received and marked in evidence.

THE COURT: Did he meet you at the station house?

THE WITNESS: I had discussed the identification of Mr. Riddick with him. His appearance had changed some from a photo which was shown to—

MR. WELKES: Objection.

THE COURT: Overruled. I will take it.

Why did you discuss it with him?

THE WITNESS: We tried to ascertain the whereabouts of the defendant.

THE COURT: Why did you discuss it with his parole officer?

THE WITNESS: We felt he may know the whereabouts of the defendant.

THE COURT: Was he on parole? That you [11] don't know?

THE WITNESS: At the time I spoke to him, I believe either he had just come off parole or he still had time on parole.

THE COURT: It's very important.

All right. Continue. Excuse me. I didn't mean to raise my voice.

THE WITNESS: I understand.

THE COURT: It's very important that we know whether he was on parole at the time or off parole.

BY MR. FELDMAN:

Q. Detective, would you read to us the pertinent information that is on here? Starting from the top?

A. Laboratory classification. Narcotics. The date is 4-4-74. And it was received from myself, Detective Fred Bisogno, shield 2732, 112th Precinct Investigating Unit, on 3-15-74. The following listed below—Laboratory number is 04047.

THE COURT: It speaks for itself in evidence. Why are we reading it into evidence?

MR. FELDMAN: Okay.

You raise no objection to the introduction of—

THE COURT: No objection for the purpose of [12] the hearing he said.

MR. WELKES: Yes.

I want to voir dire the officer somewhat on this.
THE COURT: What's that?
MR. WELKES: I want to voir dire the officer somewhat on this.
THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. WELKES:

Q. Officer, I ask you to look at this plastic envelope in which is enclosed a manila envelope, and would you tell me what this on the plastic envelope under the name, officer's signature, refers to?
A. This is the officer's signature. This would be the lab technician's signature.
MR. WELKES: I see. Okay.
THE COURT: All right.
MR. WELKES: No objection.
THE COURT: Continue, Mr. District Attorney.
MR. FELDMAN: I offer this in evidence now as People's Exhibit 2.
THE COURT: People's 2.
MR. WELKES: No objection for the purpose of [13] the hearing.
THE COURT: Deemed marked.
MR. FELDMAN: No further questions of this witness.
THE COURT: Any cross?
MR. WELKES: Yes.

CROSS-EXAMINATION

BY MR. WELKES:

Q. Detective Bisogno, when did you first discover that the defendant was charged with a robbery or the subject for investigation purpose of a robbery?
A. Approximately June of 1973.
Q. Now, in June of 1973, when you discovered this information, did you seek out and get an arrest warrant for the defendant?
A. No, sir, I did not.

Q. At any time between June of '73 and March 14th of 1974, did you get an arrest warrant for the defendant?
A. No, sir. I attempted to get a grand jury warrant.
Q. Did you get a grand jury warrant?
A. No, I did not.
THE COURT: In other words, it had not been presented?
[14] THE WITNESS: It had not been presented.
Q. And when for the first time did you learn the whereabouts of the defendant?
A. I believe January of '74.
Q. In January of '74, when you first learned the whereabouts of the defendant, did you attempt to get a warrant at that time?
A. No, sir, I did not.
Q. In other words, when you went to this house, you did not have an arrest warrant?
A. I did not.
Q. Now, did anybody, prior to your entering the house, did anybody else enter the house?
A. Yes, sir.
Q. Who was that?
A. The parole officer.
Q. To the best of your knowledge, did he search the apartment at all?
A. To the best of my knowledge, no, he did not.
Q. And he had entered the apartment?
A. Yes, he did.
Q. And he had a conversation, correct?
A. No, sir, he did not have a conversation.
Q. And did you enter the apartment with your [15] brother officers?
A. I did, too.
Q. At that time did you have your weapons drawn?
A. I did not.
Q. To the best of your knowledge, did any of your brother officers have their weapons?
A. To the best of my knowledge, no, sir.

Q. And how many officers entered the apartment with you?
A. One other.
Q. Which officer was that?
A. Detective Ferrick (Phonetic spelling).
Q. And when you entered the door of the apartment, where did Detective Ferrick go? To the best of your knowledge?
A. To the best of my knowledge, he would have been standing to the left of me, or behind me, when we entered the door.
Q. You are inside the apartment. What, if anything, did you say to the defendant when you first saw him?
A. I announced my authority as a police officer. I then asked the defendant his name and identity, and he told me who he was. And then I placed him under arrest.
[16] Q. How did you place him under arrest? Did you stand by—
A. I told him—I announced my authority after finding his identification, asking him who he was. I announced to him that he was under arrest for robbery.
Q. Where were you when you announced to him that he was under arrest?
A. Standing over the bed.
THE COURT: You advided him of his rights at that time?
THE WITNESS: Yes.
Q. You say you were standing over the bed, correct?
A. Yes.
Q. And where was Detective Ferrick (Phonetic spelling)?
A. I don't recall at that time. His exact location, I don't remember.
Q. Was he on the other side of the bed?
A. I don't recall.
THE COURT: He doesn't recall.
Q. Did you have your weapon drawn at that time?
A. No.
Q. Did you take out any handcuffs?
[17] A. At that point, no, sir.

Q. When you—you told us the defendant was seated in bed?
A. He was seated up.
Q. Did you ask the defendant to get out of bed?
A. Yes.
Q. After the defendant got out of bed, did you place any cuffs on him?
A. No. No, sir.
Q. Did either of your brother officers place any cuffs on him, to the best of your knowledge?
A. To the best of my knowledge, no, sir.
Q. And you then commenced the search of the apartment?
A. I did.
Q. Was the defendant handcuffed at the time you commenced the search of the apartment?
A. I don't believe so.
Q. Was the door left open at the time you commenced to search the apartment?
A. Which door, sir.
Q. The front door?
A. I don't recall.
Q. Who was watching the defendant at the time [18] you searched the apartment?
A. My partner.
Q. Did he have his gun drawn?
A. No.
Q. Did he have the defendant in custody?
A. By custody, what do you mean?
Q. Was he holding him? Was he touching him?
A. No.
Q. Where was the defendant?
THE COURT: (Interjecting) He was not free to leave, was he?
THE WITNESS: No.
THE COURT: He was under arrest, was he?
THE WITNESS: Yes, sir.

BY MR. WELKES:

Q. What would have happened if he had tried to walk out the door?

A. He would have been detained.

Q. Where was he standing with your brother officer at the time you conducted the search of the room?

A. He would have been to my left, approximately three feet from me, my brother officer facing him.

Q. Was your brother officer between you and [19] him?

A. To the best of my knowledge, he was.

Q. Was your brother officer between him and that dresser?

A. I don't recall.

THE COURT: What does that have to do with it?

A. (Continuing) I don't recall. He moved around. I know that.

Q. And you then searched the bed, am I correct?

A. That's correct.

THE COURT: You searched the drawer, too.

We were all over that.

Q. And you stated you found these items in the top drawer of the dresser?

THE COURT: That's true, counselor.

You have a good memory.

MR. WELKES: No further questions.

THE COURT: Step down.

MR. FELDMAN: Just one more question.

REDIRECT EXAMINATION

BY MR. FELDMAN:

Q. Detective, other than this top drawer of the dresser, what, if any other objects, did you search in this room?

[20] A. The mattress, under the mattress, under the pillowcase, and the defendant.

THE COURT: You are looking for weapons, weren't you?

THE WITNESS: Yes, sir. And the defendant's clothes as he got dressed.

THE COURT: No further questions.

MR. FELDMAN: At this time we'd ask for a brief continuance to get another witness.

THE COURT: Where is the other witness?

MR. FELDMAN: I am going to try to ascertain that.

THE COURT: It was marked ready. How long is it going to take you to find out.

MR. FELDMAN: I will let the Court know as soon as possible, within the next few minutes.

THE COURT: We'll take a short recess. You don't have a second witness available?

MR. FELDMAN: No, we don't.

* * * *

COURT CLERK MANCHER: 8072 of '74. Jail case, Obie Riddick. This is People's witness, Detective Fred Bisogno, who was previously sworn. Sit down.

[21] THE COURT: Mr. Welkes, I believe you want to make an application to recall the police officer?

MR. WELKES: Yes.

THE COURT: The police officer is recalled.

He is reminded he is still under oath.

COURT OFFICER MANCHER: The defendant is present.

RECROSS-EXAMINATION

BY MR. WELKES:

Q. Now, Detective, you remember testifying earlier that you came to this house with Mr. Tinner. Was that the parole officer?

A. That's correct.

Q. And did you discuss with him at any prior time about going into this apartment?

A. Yes, I did.

Q. Was he, in effect, your agent when you entered that apartment?

MR. FELDMAN: Objection.

THE COURT: Sustained.

Q. Did he go into that apartment under your authority?

MR. FELDMAN: Objection.

THE COURT: Sustained.

[22] Q. Did you ask him to go into the apartment first?

A. Yes, I did.

THE COURT: He went into the apartment?

THE WITNESS: Yes, he did.

THE COURT: Then he came out of the apartment?

THE WITNESS: Yes.

THE COURT: Did you have a conversation or did he give you a signal?

THE WITNESS: He gave us a signal.

THE COURT: Then you went into the apartment with your fellow officer?

THE WITNESS: That's correct.

BY MR. WELKES:

Q. You testified that after you saw him in the bed you announced your presence and you told him he was under arrest?

A. That's correct.

Q. And did you search the bed for weapons?

A. Yes, I did.

Q. Did you have any apprehension that this man would be armed?

A. Yes, I did.

Q. And you did not place any handcuffs on him?

[23] A. No, I did not.

Q. And you did not have your weapon drawn?

A. My weapon was concealed in my pocket.

Q. Was your hand on your weapon?

A. Yes, it was.

THE COURT: I am more interested in how you got there, Officer. Did you have any information regarding this defendant before you went to that apartment?

THE WITNESS: Yes, I did.

THE COURT: Do you have any complainants on these robberies?

THE WITNESS: Yes.

Q. How did you happen to go to his apartment as a result of these robberies?

THE WITNESS: The defendant had been in the hospital, Harlem Hospital, under an assumed name, and we had lost all contacts with him.

THE COURT: Why were you looking for him in the first place?

THE WITNESS: For robberies.

THE COURT: Who identified him?

THE WITNESS: I have two complainants on my own cases, separate incidents, and there was a [24] case Detective Hoffen of the 107th.

THE COURT: These two cases, how did they identify him?

THE WITNESS: By photos.

THE COURT: You showed them photos of this man and—

THE WITNESS: We showed them groups of photos.

THE COURT: That was the reason you were going over to identify him for robbery?

THE WITNESS: Yes.

THE COURT: Now I understand what happened.

BY MR. WELKES:

Q. And you had these identifications made some time before you actually went to the apartment?

A. That's correct.

Q. And again, for the record, you did not have an arrest warrant?

A. I did not.

Q. Had you presented the case to the grand jury prior to the date of the arrest?

A. No, sir.

THE COURT: No.

Q. But you knew who the defendant was at that time? Prior to going to that apartment, you knew [25] who the defendant was who you were looking for?

A. Yes, I did.

Q. Now, did you find any weapons—

A. No, I did not.

Q. (Continuing) —when you entered, when you searched the apartment?

A. No, I did not.

Q. Do you know, to the best of your knowledge, whether your brother officer had his weapon in any way pointed towards the defendant?

A. No, I do not.

MR. WELKES: I have no further questions.

THE COURT: Do you want to step up, Mr. District Attorney.

(At this point, Mr. Wagner and Mr. Henderson and Mr. Welkes approached the bench to confer with the Court.)

THE COURT: Any further questions, Mr. District Attorney?

MR. WELKES: No further questions.

REDIRECT EXAMINATION

BY MR. FELDMAN: (Continuing)

Q. Was a weapon used in any of these robberies for which this defendant was wanted?

[26] A. Yes, sir.

MR. WELKES: I would ask that be stricken.

THE COURT: I will take it.

MR. FELDMAN: No further questions.

THE COURT: Step down.

Do you rest again, Mr. District Attorney?

MR. FELDMAN: Yes.

THE COURT: There will be no further witnesses called?

MR. FELDMAN: No, Your Honor.

THE COURT: Do you have any witnesses you wish to call?

MR. WELKES: No, Judge.

THE COURT: Decision is reserved.

I want the minutes, Mr. Stenographer.

MR. WELKES: I'd like to make a motion to suppress the evidence at this time. Your Honor, mention has come up of a parole officer who was present at the

time and who, in fact, entered the apartment first at the direction of the police officer. To all intents and purposes, this parole officer was an agent, and I believe that there has been no establishment whether or not the defendant was, in fact, on parole at the time, and I believe, if a parole officer who is—only [27] if the parole officer is presently the parole officer of the defendant, the defendant is on parole, the parole officer has the right to enter the apartment.

I believe here, in effect, the police were using a parole officer to gain entrance to an apartment. Your Honor mentioned probable cause here. I believe they knew about this defendant for a long time prior to finally entering his apartment. They had his identity. They had ample opportunity to get an arrest warrant; and not only that, they had ample opportunity to get a search warrant. They failed to get both of these things, and many months transpired.

THE COURT: You may be right, but I think the only thing to determine here is whether or not the officer had reasonable grounds to believe a felony had been committed and reasonable grounds to believe the defendant had committed this felony.

And further, after making the arrest, if that's established, whether or not he had a right to search the immediate area of the defendant in a search for weapons. I think these are the two things that have to be decided.

[28] MR. WELKES: As to the immediate area, the defendant was quite obviously in custody by the time the search was made.

THE COURT: If you want to supply me a memorandum—

MR. WELKES: I would ask for a couple of weeks.

THE COURT: You can start off with People versus Finn (Phonetic spelling), 73 Misc., which is a fairly recent case, N.Y. sub 2d, 266. I am sorry. 73 Misc., 266. In that case they cite the most of the other cases that are relevant, and if you want to give me a memorandum, I'd appreciate that.

How much time do you want?

MR. WELKES: I'd like two weeks.

THE COURT: July 15th, in Part 21, where I will be sitting. That is Kew Gardens.

Same bail conditions.

COURT CLERK MANCHER: Same bail conditions. Remand the defendant.

Decision reserved on the motion.

THE COURT: People versus Finn, 73 Misc., 2d, 266.

[Certificate of Official Court Reporter Omitted]

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
HF/rb CRIMINAL TERM, PART XXI

THE PEOPLE OF THE STATE OF NEW YORK

—against—

OBIE RIDDICK, DEFENDANT

BY WILLIAM C. BRENNAN, J.

DATED July 15, 1974

Ind. No. 8072/74

DECISION OF THE SUPREME COURT,
QUEENS COUNTY,
ON MOTION TO SUPPRESS

The defendant moves for an order suppressing heroin and a hypodermic instrument seized in his apartment in a search made after an arrest on another charge.

On June 13, 1974, a hearing was held to determine if such evidence should be suppressed.

Based on the credible evidence adduced at that hearing, the Court makes the following findings of fact and conclusions of law:

During the course of an investigation into two armed robberies by Detective Fred Bisogno, the defendant was identified by the complainants as the perpetrator. On March 14, 1974, at about 12:00 noon, Bisogno accompanied by Detective Ferrick, Burnside and Parole Officer Tinner, went to the defendant's residence at 127-08 165th Street, County of Queens. Parole Officer Tinner entered the apartment and later emerged, signalling the detective that the defendant was inside. It is unclear from the evidence whether Riddick was on probation at this time. Upon receiving the signal, Detective Bisogno knocked on the apartment door which was opened by

the defendant's three year old son. Through the open door, the officer observed the defendant in his bedroom sitting in bed covered to the waist by a sheet. Entering the apartment with Detective Ferrick, Bisogno announced his authority and asked the defendant if he was Obie Riddick. When the defendant answered "yes", the officer told him he was under arrest and informed him of his rights. Riddick was then told to get out of the bed. When the defendant complied with the request, the detective noted that he was unclothed except for a pair of jockey shorts. After Obie Riddick exited from the bed, Bisogno searched the bed and a chest of drawers two feet from the bed and the defendant's clothing while Riddick dressed. In the top drawer of the chest the officer found the physical evidence which the defendant seeks to have suppressed. In response to defendant's counsel's question "did you have any apprehension that this defendant would be armed", the officer replied "yes".

Based on the credible facts adduced at the hearing, the Court reaches the following conclusions of law:

For this search and seizure to be reasonable within the meaning of the Fourth Amendment, two tests must be met. First: is the arrest here a lawful one? Second: if the arrest was lawful, did the search and subsequent seizure exceed the bounds set forth in *Chimel* v. *California* (395 U.S. 766)?

Under section 140.10(1)(b) of the Criminal Procedure Law, a police officer may make a warrantless arrest where that officer has reasonable cause to believe that the person he is arresting committed the crime for which he is being arrested whether or not such crime was committed in that officer's presence. It is clear from the facts of this case that in the course of Detective Bisogno's investigation of two robbery complaints, the defendant Obie Riddick was identified by the victims as the perpetrator. It follows then that the officer had reasonable cause to believe that Obie Riddick had committed the crime for which he was arrested. (*People* v. *Feldt*, 26 A D 2d 743, affd. 22 N Y 2d 839).

A search may be unlawful even though made incidental

to a valid arrest. (*Chimel* v. *California*, *supra*). In *Chimel* the United States Supreme Court said:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

In the case at bar, the officers arrested a suspect who had been accused of the commission of several armed robberies. They found the defendant in a state of undress. It was reasonable to anticipate that in order to clothe himself that the defendant would have to go into the chest of drawers. It was not unreasonable for them to anticipate that a person they reasonably believed to be an armed robber might have a weapon concealed in that chest of drawers. Additionally, the chest was only two feet from the bed and well within the area from which the defendant might gain possession of a weapon. The detective also testified that he searched the bed in which he found the defendant and Riddick's clothing while the defendant dressed. The search had as its objective the recovery of any weapon the defendant might have used to effect an escape and took place within an area from which the defendant might recover a

weapon. The search and seizure here were reasonable within the meaning of the Fourth Amendment.

In the course of the hearing the defendant's counsel raised the point of the presence of Parole Officer Tinner. While it is true that in a search by a parole officer, a parolee is subject to a search that would be impermissible in the ordinary situation (*People* v. *Randazzo*, 15 N Y 2d 526; *People* v. *Thompson*, N.Y.L.J. March 18, 1974, p. 15, col. 3), there is no evidence in this case to show that Tinner made any search or that the police attempted to use him as an agent to avoid the restrictions placed on them by the Fourth Amendment.

Order entered accordingly.

The clerk of the Court is directed to mail a copy of the order and decision to the attorney for the defendant.

/s/ [Illegible]
J. S. C.

DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. OBIE RIDDICK, Appellant.—Appeal by defendant from a judgment of the Supreme Court, Queens County, rendered September 24, 1974, convicting him of criminal possession of a controlled substance in the sixth degree, upon his plea of guilty, and imposing sentence. The appeal also brings up for review an order of the same court, dated July 15, 1974, which denied defendant's motion to suppress physical evidence. Judgment and order affirmed. No opinion Hopkins, Acting P.J., Damiani and Hawkins, JJ., concur; Cohalan, J., dissents and votes to reverse the judgment and order, grant the motion to suppress, and dismiss the indictment, with the following memorandum: In June, 1973 the victims of an armed robbery identified the defendant, through his photograph, as the perpetrator. Riddick was already a felon, having been convicted as one in 1970. There is some doubt as to whether the police knew of his whereabouts in June, 1973, but they admittedly knew his address in January, 1974. The arrest, effected without a warrant, was made on March 14, 1974. No attempt was made during the nine-month interval to present the case to a Grand Jury, or even to file an accusatory instrument. Nor was there any compelling reason to seek him out on March 14, 1974 without having first obtained an arrest warrant. In any event, the police officers verified the defendant's presence in his home by first sending in the defendant's parole officer. (Incidentally, defendant's sentence for the 1970 felony expired on February 12, 1974.) They then knocked at defendant's door. It was opened by the defendant's three-year-old child. There is no evidence that the defendant gave consent to the intrusion by the police (see *People* v. *Whitehurst*, 25 NY2d 389; *Bumper* v. *North Carolina*, 391 US 543); it would be farcical to suggest that the child gave the officers permission to enter the apartment (see *People* v. *Gonzalez*, 39 NY2d 122). In *Gonzalez* a consent was coerced from the defendants. Commenting on the fact

situation, Chief Judge Breitel wrote (p 129): "Another factor to be considered in determining the voluntariness of an apparent consent is the background of the consenter [citations omitted]. A consent to search by a case-hardened sophisticate in crime, calloused in dealing with police, is more likely to be the product of calculation than awe. Here, the Gonzalezes were both under 20 years of age and were newlyweds of three days. They had had very limited prior contact with the police. Under these circumstances, the ineluctable inference, except to the jaded, is that the consents could not be, on any creditable view of the agents' testimony, the product of a free and unconstrained choice." As with the Gonzalezes, the three-year-old could scarcely qualify as a sophisticate. When the door was opened one of the police officers saw the defendant lying in his bed. The officers entered the apartment, roused the defendant and announced their authority and purpose. In a search incident to the arrest, a controlled substance was found and seized. CPL 120.80 (subd 4) mandates that, in order to make an arrest, an officer can effect entry into a suspect's premises only after announcing his authority and purpose. At bar the officers first entered—without permission—and then announced their authority and purpose. Their failure to observe the statutory provision makes the arrest invalid (see *People* v. *Frank*, 35 NY2d 874, revg 43 AD2d 691 on the dissenting memorandum; *People* v. *Floyd*, 26 NY2d 558). Since the arrest was unlawful, any evidence seized during a search pursuant thereto must be suppressed.

OPINION OF THE NEW YORK COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

THEODORE PAYTON, APPELLANT

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

OBIE RIDDICK, APPELLANT

Argued April 28, 1978; decided July 11, 1978

JONES, J.

[1] We hold that an entry made for the purpose of effecting a felony arrest within the home of the person to be arrested by a police officer who has entered without permission of the owner, if based on probable cause, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances.

Defendant Theodore Payton has been convicted on a jury's verdict of the felony murder of a service station manager in connection with an armed robbery committed on the morning of January 12, 1970 by a man carrying a rifle and wearing a ski mask, who fled the scene with the weapon and cash following the homicide. Two days later, on January 14, two eyewitnesses to the crime—both of whom had known defendant—identified him to the police as the killer. One of the witnesses also furnished defendant's address. On the morning of January 15 about 7:30 A.M., without having first secured a warrant, the detective in charge of the investigation went with three other detectives and a police sergeant to defendant's apartment. Although they observed a light

shining beneath the door and heard a radio playing, there was no answer when they knocked. To open the locked metal door they summoned officers from the Emergency Service Department, who arrived about a half hour later and with the aid of crowbars forced open the door. The police entered the apartment, checked the rooms for defendant who was not found, observed a .30 caliber shell casing in plain view on top of a stereo set and then conducted a full-scale search of the apartment, which revealed a shotgun with ammunition in a closet and a sales receipt for a Winchester rifle and photographs of defendant with a ski mask in a dresser drawer. The following day defendant surrendered himself to the police and was subsequently indicted on charges arising out of the service station homicide.

Following a pretrial suppression hearing, the court, on concession by the District Attorney, suppressed all of the items found in the apartment with the exception of the shell casing. The suppression court held that the casing had been inadvertently observed while the police were lawfully in the premises to make a warrantless arrest for a felony which they had reasonable grounds to believe defendant had committed.[1]

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[1] Sections 177 and 178 of the Code of Criminal Procedure, in effect at the time of this entery, provided:

"§ 177. In what cases allowed.

"A peace officer may, without a warrant, arrest a person.

"1. For an offense, committed or attempted in his presence, or where a police officer as enumerated in section one hundred fifty-four-a of the code of criminal procedure, has reasonable grounds for believing that an offense is beng committed in his presence.

"2. When the person arrested has committed a felony, although not in his presence;

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

"4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

"5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code."

"§ 178. May break open a door or window, if admittance refused.

"To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."

During the trial the People produced testimony that two .30-30 Winchester discharged shell casings had been found at the scene of the crime and that those shells and the .30 caliber shell casing found in defendant's apartment had been fired from the same rifle. They also called as a witness the owner of a sporting goods store in Peekskill, New York, the store which had issued the rifle sales receipt seized at the time of defendant's arrest but suppressed prior to trial. He testified that on November 19, 1969 he had sold a .30-30 Winchester rifle and shells to a man who identified himself as Theodore Payton. There was also introduced in evidence the Federally required Firearm Transaction Record retained by the seller which bore defendant's signature. The defense objected to both the testimony and the exhibit as inadmissible "tainted fruit" of the unlawful seizure of the suppressed sales receipt. The objections were overruled and, after a posttrial hearing on defendant's motion to set aside the verdict on the ground that the evidence at trial was the product of material which had been ordered suppressed, the motion was denied. The Appellate Division affirmed defendant's conviction of felony murder.

Defendant Obie Riddick has been convicted of criminal possession of a controlled substance in the sixth degree on his plea of guilty following denial of his motion to suppress a quantity of narcotics and a hypodermic syringe taken from a dresser drawer in his home when he was arrested there on March 14, 1974 for the commission of two armed robberies which had occurred in 1971. In June, 1973 the victims had identified defendant from a photograph as the perpetrator of the robberies. Following that identification, the detective investigating the robberies contacted defendant's parole officer and in January, 1974 learned his address. With-

out having procured an arrest warrant, about noon on March 14, 1974 the detective, two other detectives and the parole officer went to the house where defendant was living. After the parole officer had entered the house, determined that defendant was present and so signaled the waiting policemen, the detective investigating the robberies knocked on the door, which was opened by defendant's three-year-old son. Through the open door the detective observed defendant in the bedroom sitting in bed covered to the waist by a sheet. Entering the apartment with one of the other officers, the detective announced his authority and asked defendant if he was Obie Riddick. Defendant acknowledged his identity and was told that he was under arrest, advised of his rights and instructed to get out of bed. When it then became apparent that defendant was dressed only in his underwear and that he would have to dress, the detective searched the bed, a chest of drawers two feet from the bed and the defendant's clothing. In doing so he found a quantity of narcotics and a hypodermic syringe in the top drawer of the chest. After indictment for the crimes of criminal posssesion of a controlled substance in the fifth degree and criminal possession of a hypodermic instrument defendant moved to suppress the drugs and syringe, contending that the arrest had been unlawful because it had been made without a warrant and without announcement by the police of their purpose before entering defendant's home.[2] The motion was

[2] CPL 140.15 provides with respect to arrest without a warrant: "4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

Subdivisions 4 and 5 of section 120.80 provide:

"4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

"(a) Result in the defendant escaping or attempting to escape; or

"(b) Endanger the life or safety of the officer or another person; or

"(c) Result in the destruction, damaging or secretion of material evidence.

"5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary."

denied after a hearing, the suppression court finding that the arrest was lawful because it was based on probable cause and that the search conducted incidental to the arrest was reasonable and did not exceed the limits set out in *Chimel* v. *California* (395 US 752). Defendant's contentions were not explicitly addressed. A plea of guilty to a reduced charge in satisfaction of the indictment followed the denial of suppression. The conviction was affirmed at the Appellate Division.

In each of these cases we are confronted with the claim that evidence, the introduction or availability of which may be regarded as critical to defendants' convictions, should have been suppressed because it had been unlawfully procured, that is, seized after an entry into defendant's home to make an arrest without either the authority of a previously issued warrant or the existence of exigent circumstances, in violation of constitutional protections. In Payton the challenge is to the .30 caliber shell casing found on defendant's stereo set which—matching those found at the service station—may well have contributed to identify defendant as the killer in the jury's eyes; in Riddick it is to the narcotics and hypodermic syringes, denial of suppression of which prompted defendant's plea of guilty. In Riddick reliance is also placed on the absence of compliance with a statutory requirement of prior announcement of the police officers' authority and purpose.

The parties to these appeals have extensively briefed the question whether, without infringement of constitutional rights, an arrest may be made within the residence of a defendant based on unquestionable probable

cause—as each of these arrests was—without a warrant in the absence of exigent circumstances. Not insubstantial arguments are mounted in support both of an affirmative and a negative response to the question, and multiple supporting authorities are offered on each side. It is contended by defendants that physical invasion of the home is the "chief evil against which the wording of the Fourth Amendment is directed" (*United States* v. *United States Dist. Ct.*, 407 US 297, 313); that it has been conclusively determined that, absent exigent circumstances (of which there were none here), an otherwise proper warrantless entry of the home to search for property is impermissible (*Coolidge* v. *New Hampshire*, 403 US 443); that the sanctity of the home is equally invaded when entry is made for the purpose of arrest; that the more serious consequences of the latter class of entry provide a more compelling reason to require the authority of a warrant in such a situation (*United States* v. *Reed*, 572 F2d 412; *Accarino* v. *United States*, 179 F2d 456)—in sum, that if a warrant or exigent circumstances is required for a search and seizure, any proper sense of constitutional symmetry would mandate that the same predicate be required for an arrest.

The People, for their part, assert the existence of an established difference between entry in a home to effect an arrest and on to search and seize property (as to which they agree that a warrant is required in the absence of exigent circumstances), and urge that a proper regard for public safety permits—even demands—recognition of a right in a peace officer to enter a home for the purpose of arresting one who the officer has reasonable grounds to believe has committed a felony, without the necessity for obtaining a warrant, even though there be no exigent circumstances. They contend that the right to make such an arrest, as an alternative to arrest with a warrant, has been recognized both at common law before the adoption of the constitutional provisions and since their adoption, and that such procedure is presently authorized by explicit legislation in at least 30 States, including New York, as well as by the Model

Code of Pre-Arraignment Procedure promulgated by the American Law Institute (§ 120.6, subd [1]).

[2] The parties also draw the conflicting inferences (which others have similarly drawn) from holdings and writings of the Supreme Court of the United States and its individual Justices. Defendants infer from *United States* v. *Watson* (423 US 411) that an arrest following a warrantless entry in the home is invalid; the People conclude from *Ker* v. *California* (374 US 23) that the contrary is the case. The fact is that the Supreme Court has not yet resolved the issue, as appears from the explicit statement in the plurality opinion in *Watson* that the question "'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest'" is "still unsettled" (423 US, at p 418, n 6). Nor has the issue been resolved in our court. In determining now that the warrantless arrests effected in these cases did not violate defendants' constitutional rights to be free from unreasonable searches and seizures, we rely both on what we perceive to be a substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of making an arrest, and on the significant difference in the governmental interest in achieving the objective of the intrusion in the two instances.

In the case of the search, unless appropriately limited by the terms of a warrant, the incursion on the householder's domain will be both more extensive and more intensive and the resulting invasion of his privacy of greater magnitude than what might be expected to occur on an entry made for the purpose of effecting his arrest. A search by its nature contemplates a possibly thorough rummaging through possessions, with concurrent upheaval of the owner's chosen or random placement of goods and articles and disclosure to the searchers of a myriad of personal items and details which he would expect to be free from scrutiny by uninvited eyes. The householder by the entry and search of his residence is stripped bare, in greater or lesser degree, of the privacy which normally surrounds him in his daily living, and,

if he should be absent, to an extent of which he will be unaware.

Entry for the purpose of arrest may be expected to be quite different. While the taking into custody of the person of the householder is unquestionably of grave import, there is no accompanying prying into the area of expected privacy attending his possessions and affairs. That personal seizure alone does not require a warrant was established by *United States* v. *Watson* (423 US 411, *supra*), which upheld a warrantless arrest made in a public place. In view of the minimal intrusion on the elements of privacy of the home which results from entry on the premises for making an arrest (as compared with the gross intrusion which attends the arrest itself), we perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence. To the extent that an arrest will always be distasteful or offensive, there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable.

At least as important, and perhaps even more so, in concluding that entries to make arrests are not "unreasonable"—the substantive test under the constitutional proscriptions—is the objective for which they are made, viz., the arrest of one reasonably believed to have committed a felony, with resultant protection to the community. The "reasonableness" of any governmental intrusion is to be judged from two perspectives—that of the defendant, considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action. The community's interest in the apprehension of criminal suspects is of a higher order than is its concern for the recovery of contraband or evidence; normally the hazards created by the failure to apprehend far exceed the risks which may follow nonrecovery.

The apparent historical acceptance in the English common law of warrantless entries to make felony arrests (2 Hale, Historia Placitorum Coronae, History of

Pleas of Crown [1st Amer ed, 1847], p 92; Chitty, Criminal Law [3d Amer, from 2d London, ed. 1836] 22-23), and the existence of statutory authority for such entries in this State since the enactment of the Code of Criminal Procedure in 1881[3] argue against a holding of unconstitutionality and substantiate the reasonableness of such procedure. In *People* v. *Samuel* (29 NY2d 252, 264) we said: "While antiquity is not an infallible criterion for determining the scope of constitutional rights, traditional usage and understanding is helpful in defining the privilege against self incrimination." That rationale is even more persuasive when we are determining "reasonableness"—a quality, not always constant, which reflects and derives substance from the standards and mores of the time and the society.

Nor do we ignore the fact that a number of jurisdictions other than our own have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest.[4] The American Law Institute's Model Code of Pre-Arraignment Pro-

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[3] Sections 177 and 178 of that statute provided as follows:

"§ 177. * * *

"A peace officer may, without a warrant, arrest a person,

"1. For a crime, committed or attempted in his presence;

"2. When the person arrested has committed a felony, although not in his presence;

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it".

"§ 178. * * *

"To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."

These sections remained unchanged, except for expansion of the grounds for warrantless arrest provided in section 177 by amendments in 1960, 1963 and 1967, until replaced by the Criminal Procedure Law on September 1, 1971. The substance of the provisions was continued and expanded in sections 140.10, 140.15 (subd 4) and 140.25 (subds 1-3) of the present statute.

[4] American Law Institute, Model Code of Pre-Arraignment Procedure (1975) Commentary, Appendix XI.

cedure makes similar provision in section 120.6, with suggested special restrictions only as to nighttime entries. The accompanying commentary states: "To go further and require a warrant or a showing of necessity before police may make a felony arrest on private property even in daytime seems unduly restrictive. Moreover, apart from the specially alarming quality of nighttime entries and apart from search considerations, it is far from clear that an arrest in one's home is so much more threatening or humiliating than a street arrest as to justify further restrictions on the police." (American Law Institute, Model Code of Pre-Arraignment Procedure [1975], p 307).

[1] For these reasons and in the absence of an explicit determination by the Supreme Court which would permit us no alternative, we hold that the entries made by the police in the cases before us did not violate defendants' constitutional protections against unreasonable searches and seizures. In reaching this conclusion we are not unmindful of considered decisions in the Federal courts which have reached an opposite result (*e.g.*, *United States* v. *Reed*, 572 F2d 412, *supra; United States* v. *Killebrew*, 560 F2d 729).

[3] We turn then to the other contentions made in Payton. First, it is argued that the true purpose of the police officers who entered defendant's apartment was not to make an arrest but rather to conduct a full-blown search of the premises, in which event the plain view doctrine would not be applicable and the shell casing too should have been suppressed. The determination of the officers' purpose, however, turned on a question of fact, the resolution of which was dependent on the credibility ascribed by the hearing Judge to the testimony of the entering officer. That factual issue, having been resolved in favor of the People by the suppression court and affirmed at the Appellate Division, is now beyond review by this court.

Next, Payton renews his challenge to the admissibility of the testimony of the Peekskill sporting goods store owner and of the latter's gun sale record as tainted fruit of the initial unlawful seizure of the gun sale receipt

which occurred when defendant's apartment was illegally searched. To refute defendant's claim that, but for the seizure of the sales receipt, the prosecution would not have gained access to the testimony or the record, the People assert (as the trial court found after the posttrial hearing) that the allegedly tainted evidence was admissible under the so-called "inevitable discovery" doctrine (cf. *People* v. *Fitzpatrick*, 32 NY2d 499). Defendant responds that the factual situation here was insufficient to support the application of that doctrine. The evidence, however, is to the contrary.

[4, 5] In the first place the label "inevitable discovery" is inaccurate and therefore misleading. The doctrine does not call for certitude as the literal meaning of the adjective "inevitable" would suggest. What is required is that there be a very high degree of probability that the evidence in question would have been obtained independently of the tainted source. The proof in this case meets that standard and supports the finding of the Trial Judge at the posttrial hearing. Second, any and every application of the doctrine of inevitable discovery will inescapably be exposed to the observation that the police did not in fact pursue the inevitable course to discovery.

The investigating detective testified that, because the murder weapon was never recovered, proof of defendant's ownership of a gun such as that used in the killing was of critical importance. The detective knew that the weapon used was a Winchester rifle. He also testified that he had learned from a friend and hunting companion of defendant that the latter had purchased such a gun in "upstate New York" in November, 1969. He further stated without contradiction—and this was critical in this instance—that it was "normal police procedure" in investigations such as this to communicate with the Tobacco, Alcohol and Firearms Unit of the United States Treasury Department, which maintains a list of all gun shops, and then to send out communications to and to make personal contacts with such shops

in an effort to locate the weapon sought.[5] He stated that in this instance he would have followed this procedure and would have inquired of gun stores, which would have included the one in Peekskill. Inquiry at the Peekskill store would have led directly to defendant because of the records of all gun sales maintained under Federal requirement. In corroboration the owner of the Peekskill store testified that he maintained the required records of gun sales and that he was accustomed to checking his records when police inquiries were made. The Trial Judge found that the People had established "that normal police investigative techniques would have uncovered the Peekskill gun dealer" and thus that "the unlawful seizure of the bill of sale was not a *sine qua non* of the discovery" of the seller. We agreed.[6]

[6] Finally, it is asserted that defendant was deprived of his constitutional right to represent himself at his trial. The exercise of this right requires an unequivocal request to proceed *pro se* (*People* v. *McIntyre*, 36 NY2d 10, 17), which was lacking in this case. Statements made by defendant as to his being his own lawyer were associated with references to discharging his assigned counsel and securing new representation and were always overshadowed by applications for adjournments and postponements for reasons which he declined to divulge. At no time did he demonstrate an actual fixed intention and desire to proceed without professional assistance in his defense to the charges against him.

[7] It remains only briefly to address the other contention advanced in Riddick—that the police entry was statutorily invalid for the failure of the police officers

[5] When the cross-examiner resorted to the "reductio ad absurdum", the officer readily admitted that he had never known any such inquiry to include every gun shop in the State. There was, however, no contradiction of his testimony as to the normal police procedure in making such investigations.

[6] As to the possible alternative ground for reaching this conclusion, namely, that the testimony of the keeper of the gun shop was admissible under the attenuation rule with respect to the testimony of live witnesses, see *People* v. *Mendez* (28 NY2d 94) (compare, also, *United States* v. *Ceccolini*, —— US ——, 46 USLW 4229).

to give notice of their authority and purpose prior to their entry to make the arrest. The requirement that such notice be given before breaking into a building to obtain access to effect an arrest is of ancient vintage and serves the purpose of providing the person within an opportunity to respond to the demand for admittance, thus obviating the need for forcible entry (*Miller* v. *United States*, 357 US 301). The statement of the purpose demonstrates the inapplicability here of the statutory section in effect at the time in question which codified the common-law requirement.[7] In Riddick the purpose of the notice requirement was accomplished when, in response to the investigating officer's knock, defendant's infant son opened the door, and promptly on entering the officers declared their authority and their purpose to arrest defendant. What is determinative is that the entry was peaceable. No forcible entry was necessary or effected and no prejudice resulted from the officers' failure to give notice outside the open door.

Accordingly, for the reasons stated, the order of the Appellate Division in each case should be affirmed.

WACHTLER, J. (dissenting). For the reasons stated by Judge COOKE in his dissenting opinion I too would hold that the police need a warrant to enter a home in order to arrest or seize a person, unless there are exigent circumstances. Thus in the Riddick case where there was no exigency I would reverse, suppress the evidence and dismiss the indictment. In the Payton case I would reach substantially the same result as Judge COOKE proposes, but for somewhat different reasons.

Initially it seems to me that in the Payton case the circumstances were sufficiently compelling to permit the police to enter the defendant's apartment to arrest him without a warrant. The record shows that from the time of the murder the police had actively sought the killer. As a result of their continuous and intensive investigation they soon identified the defendant, two days after the crime, and early the following morning went

[7] CPL 120.8 (subd 5) (*supra*, n. 2).

to his apartment. There they observed a light shining beneath the door and heard a radio playing. Thus for several days the police had been in continuous pursuit of the killer when they arrived at the defendant's apartment, where they had reason to believe he might be hiding, particularly in view of their observations at the scene. Under these circumstances I believe it was reasonable for the police to continue their pursuit into the apartment in order to take a dangerous killer into custody (cf. *People* v. *Fitzpatrick*, 32 NY2d 499, 509).

But the right to enter for the limited purpose of arresting the defendant did not justify a full-scale search of the defendant's apartment for evidence of the crime. The People commendably admitted this at the hearing and the court suppressed all of the evidence seized, except for the shell casing which was found in plain view. I agree with that determination. But I cannot agree with the court's further holding that certain fruits of the illegal search—namely, the records of a Peekskill gun dealer whose name appeared on a receipt seized during the search—was properly admissible under the so-called "inevitable discovery" doctrine, on the theory that the police would have discovered this evidence in any event through normal police procedures.

The inevitable discovery doctrine is unrealistic in the purest sense. It permits the court to ignore what really happened and to rely instead on hypothesis. In this case for instance the police admitted that they did, indeed, obtain the gun shop records as a direct result of the illegal seizure of the gun receipt and that the evidence was therefore a classic example of poisoned fruit. Nevertheless ignoring the reality of the direct connection the court held that the evidence was not tainted because the police would, or should, have obtained it in the normal course of their investigation although they had made no effort to do so.

Apart from being completely unrelated to what really happened, this determination must, on the facts of this case, rest on pure conjecture. Without the receipt the only information the police had which could have led them to the record of the gun sale was a statement from

the defendant's friend and hunting companion that the defendant had purchased a weapon, similar to the one sought, in "upstate New York" in November, 1969. Furthermore, although it was noted that the Federal Government requires gun dealers to make a record of their sales, it was conceded that these records are not sent to any central repository. Thus the police could not obtain a record of the sale from the Federal Government. The Federal authorities could only furnish a list of all registered gun dealers in the State. The police would then have to contact every dealer individually to see if a record had been made and was still available.

At the hearing one of the officers testified that at the time there were approximately 1,100 gun dealers registered in the State. The record does not indicate how many of these dealers were located in the New York City area, which presumably could have been eliminated from the search. But even eliminating these dealers the task of locating the record of the sale would have involved a considerable effort. In fact it would have involved such an effort that the police officers themselves admitted that they could not recall a single instance where an investigation of this nature and magnitude had been undertaken. Of course they had not actually employed this approach in this case. Thus the determination that the police would have discovered the sale record in the normal course of their investigation, through communications with gun dealers, does not rest on experience, nor does it even rest on proof of a normal police procedure. As far as this record shows this type of investigation was neither tried nor proven and would have been quite extraordinary.

This is not the type of inevitability which was contemplated in *Fitzpatrick* (*supra*, at p 507) where the court repeatedly noted that discovery of the evidence was "certain" and the police had only to look in "the next most reasonable place". Here then were literally hundreds of reasonable places to look, most of which were widely scattered throughout the State.

Apparently the majority recognizes the difficulty of holding that the police would have inevitably prevailed in the face of so many obstacles. Accordingly they have redefined the inevitable discovery doctrine by holding that it does not actually require "certitude" as the term itself implies, and we held in *Fitzpatrick*. It simply requires "a very high degree of probability that the evidence in question would have been obtained independently of the tainted source." Now apparently the only thing inevitable about the inevitable discovery doctrine is that the police with the benefit of hindsight, will inevitably be able to show that they could have obtained the evidence lawfully by employing some other technique, no matter how hypothetical and no matter how involved or extraordinary resort to the procedure would have been.

This type of reasoning can only serve to erode the exclusionary rule. In many, if not most cases, the police will undoubtedly be able to point to some lead which if pursued with fanatical devotion would have ultimately led them to the evidence which was actually obtained unlawfully. Unfortunately it is in cases where the evidence could have been obtained through lawful, but time-consuming methods that the exclusionary rule is most needed to discourage the police from resorting to the unconstitutional short cut (see Pitler, Fruit of the Poisonous Tree, 56 Cal L Rev 579, 630).

The mischief caused by the "inevitable" or "very highly probable" discovery doctrine is well illustrated in the case now before us. Here the majority has held that the police may enter a home without a warrant to make an arrest although they concededly could not have entered to make a search. The theory is that an entry to arrest is less intrusive than a search because it does not involve a wholesale rummaging through the individual's belongings. Yet, despite the fact that the police did in fact completely rummage through the defendant's apartment and belongings after entering to make the arrest, the majority holds that the police should not be deprived of the illegal fruits because the evidence would have been discovered in any event in the normal course of the police investigation. This decision can

hardly be expected to discourage the police from completely searching the premises for evidence after entering for the "limited" purpose of making an arrest. Thus in this case the inevitable discovery doctrine has even undermined the basic premise on which the majority relies to support its conclusion that an entry to make an arrest is significantly different from an entry to search for evidence.

Accordingly, in the Payton case, I would reverse and suppress all evidence of the purchase of the weapon.

FUCHSBERG, J. (dissenting). I too would reverse in each of these cases.

My deepening concern over the proliferation of rationales which erode the protection the warrant requirement was intended to provide against illegal governmental intrusions on the privacy of home and person puts me at one with Judge COOKE in what he says so well on that subject today. (See, also, Younger, Constitutional Protection on Search and Seizure Dead? 3 Trial, Aug.-Sept., 1967, at p 41.)

But on the matter of "inevitable discovery" and the role it plays in the Payton case in particular, while my views are in harmony with the analysis on which Judge WACHTLER would dispose of that issue here, I would add some thoughts of my own.

Though hardly universally accepted (see *Fitzpatrick* v. *New York*, 414 US 1050 [WHITE, J., dissenting from denial of certiorari]), the "inevitable discovery" exception to the exclusionary rule commended itself to those with whom it originally won favor largely because conceptually it was to apply in factual contexts which, in spirit, if not in dictionary definition, bespoke "inevitability". Thus, while I appreciate the majority's reluctance to continue a commitment to a definition which calls for the certitude, if not predestination, connoted by a literal reading of the word "inevitable", it seems to me that the shift the majority today makes to one which talks only in terms of a *degree* of "probability" undermines its validity.

No matter how sincerely employed, hindsight rationalization of a train of events that never actually took place is bound to be weighted down with subjective factors difficult to appraise or disprove. Consequently, it would almost always be possible to make a colorably persuasive argument that the illegally discovered evidence would have been turned up in any event.

It follows that the sidestepping of constitutional safeguards will become all too easy—as is well illustrated by Judge WACHTLER'S revealing recital of the Payton facts—unless the People, when relying on "inevitable discovery", are made to meet that burden of proof which, short of certainty, is most demanding and most comprehensible. Therefore, if, as a predicate for the invocation of inevitable discovery, we are to move to an avowed standard short of true "inevitability", it should be to one that asks no less than proof that lawful discovery would have taken place beyond a reasonable doubt.

The legal distinctions among our varied standards of proof are too often honored in their semantics rather than in their substance (see 9 Wigmore, Evidence [3d ed], § 2497). No doubt this is because they are easier to articulate than to apply. But, at least, the ingrained familiarity which the concept of proof beyond a reasonable doubt enjoys among the members of our society—repeatedly intoned as it is in the determinations of guilt or innocence under our system of criminal justice—affords immeasurably more assurance of strict application of its language than we can count on in the verbalistic shadowland where words and phrases such as "preponderance", "satisfactory", "clear and convincing", "reasonable certainty" and now "high degree of probability" too often are forced to dwell.

COOKE, J. (dissenting). Today, the majority of this court holds that in the absence of exigent circumstances, the police may enter the home of a suspect, whether by force or simply without his consent, in order to effect an arrest for a felony for which they have probable cause but no warrant.

In so doing, the court leaves the law of this State in an anomalous state of flux: the Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant except in carefully circumscribed instances (*Katz* v. *United States*, 389 US 347, 357); yet, in the case of an arrest of a person, where the invasion of personal privacy interests is that much greater, the protections afforded by the amendment may be cast aside based solely upon the arresting officer's subjective notion of probable cause. Thus, while a citizen's guarantee to be free from unreasonable governmental intrusion constitutes the heart of the Fourth Amendment, the bifurcated standard between search and arrest announced today accords an individual's bare possessions a greater quantum of protection than his very person, reviving the values of an era in which property interests were exalted over personal liberties.

Surprisingly, the Supreme Court has yet to confront the question of whether the police may arrest a man in his home—in the absence of exigent circumstances without a warrant (see, e.g., *United States* v. *Santana*, 427 US 38; *Jones* v. *United States*, 357 US 493, 499-500), but has, nevertheless afforded valuable insights as to its proper resolution. Thus, in *Coolidge* v. *New Hampshire* (403 US 443), Justice STEWART, writing for the majority and responding to Justice WHITE'S statement in dissent, stated: "It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.' * * * If we were to accept MR. JUSTICE WHITE'S view that warrantless entry for purposes of arrest * * * [is] *per se* reasonable, so long as the police have probable cause, it would be difficult to see the basis for distinguishing searches of houses and seizures of effects. * * * If we were to agree with MR. JUSTICE WHITE that the police may, whenever they

have probable cause, make a warrantless entry for the purpose of making an arrest * * * then by the same logic *any* search or seizure could be carried out without a warrant, and we would simply have to read the Fourth Amendment out of the Constitution" (*id.*, at pp 477-480; see, also, *Warden* v. *Hayden*, 387 US 294; *Davis* v. *Mississippi*, 394 US 721, 728; *Wong Sun* v. *United States*, 371 US 471, 480-481).

Although the point has not been squarely adjudicated since *Coolidge* (see *United States* v. *Watson*, 423 US 411, 418, n 6), its proper resolution, it is submitted, is manifest. At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed (see, e.g., *Boyd* v. *United States*, 116 US 616, 630; *Camara* v. *Municipal Ct.*, 387 US 523, 528). To achieve that end, the framers of the amendment interposed the warrant requirement between the public and the police, reflecting their conviction that the decision to enter a dwelling should not rest with the officer in the field, but rather with a detached and disinterested Magistrate (*McDonald* v. *United States*, 335 US 451, 455-456; *Johnson* v. *United States*, 333 US 10, 13-14). Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control any contemplated entry, regardless of the purpose for which that entry is sought. By definition, arrest entries must be included within the scope of the amendment, for while such entries are for persons, not things, they are, nonetheless, violations of privacy, the chief evil that the Fourth Amendment was designed to deter (*Silverman* v. *United States*, 365 US 505, 511).

The court reaches its conclusion that a warrant is not required for a police officer to enter a private home and effect an arrest therein, so long as he has probable cause to believe that a felony has been committed on a number of factors, none of which, it is submitted, supports its holding. Reasoning that the intrusion which attends entry into the home to effect a warrantless arrest is

somehow less egregious than entry to conduct a search, the majority simply reads the warrant requirement out of the Fourth Amendment. Even if one were to accept the conclusion that incursion for the purpose of arrest is less extensive than that for search (but see *Foley* v. *Connelie*, —— US ——, ——, 46 USLW 4237, 4239; *United States* v. *Watson*, 423 US 411, 428 [POWELL, J., concurring]; *Chimel* v. *California*, 395 US 752, 766 [WHITE, J., dissenting]), it is difficult to harmonize the constitutional dictate that any governmental intrusion into the sanctity of the home must be controlled by a neutral Magistrate with whatever actions the police may take after that intrusion is a *fait accompli*. Indeed, from the standpoint of the citizen—to whom the language of the Fourth Amendment is directed—it makes little difference whether the invasion of the privacy of his home was made to effect a warrantless arrest or a warrantless search (*Lankford* v. *Gelston*, 364 F2d 197, 205).

The police are constitutionally forbidden to enter and search an individual's home in the absence of exigent circumstances, even where there is no doubt that the object of the search is within (*Agnello* v. *United States*, 269 US 20, 32). Nevertheless, solely because of the officer's perception of probable cause this same individual may have his constitutional guarantee of privacy violated and may be exposed to arrest while still in his dwelling. The distinction is tenuous at best, for it may be said that an entry to arrest is simply a search for a person rather than a search for things (*Dorman* v. *United States*, 435 F2d 385, 390-391; *Commonwealth* v. *Forde*, 367 Mass. 798, 805) and that the arrest itself is "quintessentially a seizure" (*United States* v. *Watson*, 423 US 411, 428 [POWELL, J., concurring]). In short, the constitutional guarantee that assures citizens the privacy and security of their homes unless determined otherwise by a judicial officer, applies with equal force in the case of entry to arrest a suspect as it does in the case of entry to search for property (*United States* v. *Reed*, 527 F2d 412; *United States* v. *Killebrew*, 560 F2d 729; *United States* v. *Calhoun*, 542 F2d 1094; *United States* v. *Shye*, 492 F2d 886; *Vance* v. *North Carolina*, 432 F2d 984; *State* v. *Cook*,

115 Ariz. 188; *People* v. *Ramey*, 16 Cal. 3d 263, cert den 429 US 929; *People* v. *Wolgemuth*, 43 Ill. App 3d 335).

As the majority notes, proper resolution of these cases hinges on the balancing of two competing, but not necessarily irreconcilable, concerns:) the individual's interest in maximum security within his home, where he has a greater quantum of protection than in public (see *United States* v. *Watson*, *supra*; *People* v. *De Bour*, 40 NY2d 210), and the interest of the State in apprehending felons and maintaining an orderly society. As noted, the Fourth Amendment was drafted to secure the right of privacy against any arbitrary governmental intrusion by taking that decision away from the police and placing it with a neutral Magistrate. But the protections afforded by the amendment are not absolute; instead, they are governed by a standard of general reasonableness (*United States* v. *Rabinowitz*, 339 US 56, 70 [FRANKFURTER, J., dissenting]). In some instances where the exigencies of the moment will not tolerate the delay incident to obtaining a warrant, a warrantless entry and arrest will satisfy this ultimate standard of reasonableness (see, e.g., *Warden* v. *Hayden*, 387 US 294; *Ker* v. *California*, 374 US 23; *People* v. *Hodge*, 44 NY2d 553). In still others, an individual may simply be located in an area in which his reasonable expectations of privacy must be subsumed by the demands of the public weal. Thus, where an individual is exposed to public view, expectations of privacy are substantially diminished and warrantless arrests are reasonable (*United States* v. *Watson*, 423 US 411, *supra*; *Santana* v. *United States*, 427 US 38, *supra*).

But these are not cases where the exigencies of the circumstances would not brook delay or where the arrests were effected in a public place. When an individual is safely ensconced within the confines of his home, special considerations are brought to bear. It merits little repetition or citation of authority but to note that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" (*United States* v. *United States Dist. Ct.*, 407 US 297, 313). The sanctity of a private home is traditional to our Anglo-

Saxon heritage (Coke, Third Institutes, p 162), and the Constitution itself points to the proper procedure to be followed in intruding upon this precious sanctuary. That basic principle—the constitutional guarantee that, except in a few jealously guarded circumstances, assures citizens of the privacy and security of their own homes unless a judicial officer should determine otherwise—is applicable not only in cases of entry to search for and seize property, but in instances of entry to search for and seize a person as well. Indeed, the Fourth Amendment itself speaks of searches and seizures of both persons and property in indistinguishable terms. It is illogical at this juncture for the court "to pay homage to the considerable body of law that has developed to protect an individual's belongings from unreasonable search and seizure in his home, and at the same time assert that identical considerations do not operate to safeguard the individual himself in the same setting" (*People* v. *Ramey*, 16 Cal. 3d 263, 275, *supra*).

Nor would an onerous burden be placed upon the police by requiring them to obtain approval of a judicial officer prior to their nonconsensual entry into a suspect's home in the absence of extraordinary circumstances. On the contrary, what imposition of a warrant requirement would accomplish would be the minimization of nonconsensual entry into the home by overzealous police officers who may occasionally lose sight of the citizen's expectation of privacy. Thus, the warrant requirement would permit a neutral Magistrate to make the decision whether to authorize arrest, just as he must do in the search and seizure context, rather than leave this decision to the oft-times colored determinations of the police. As Justice JACKSON has noted (*Johnson* v. *United States*, 333 US 10, 13-14): "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's

disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

Lastly, the court relies on the existence of statutes and the American Law Institute imprimatur codifying the common-law rule authorizing warrantless arrests in private homes. To be sure, the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years, but neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented here (*see Brown* v. *Board of Educ.*, 347 US 483, 490-495; *Walz* v. *Tax Comm.*, 397 US 664, 678) and can never be a substitute for reasoned analysis.

Although I subscribe to the well-reasoned exegesis of Judge WACHTLER concerning the majority's misconception of the inevitable discovery rule, I cannot agree that the facts in the Payton case were so compelling as to allow the police to dispense with a warrant prior to their forcible entry into defendant's apartment. The police were well aware of defendant's identity and place of residence the day before their warrantless break in. In the intervening period they had ample opportunity to secure the approval of a detached judicial officer. Moreover, even on the day of the forcible entry, the police were compelled to delay even further while waiting for the arrival of officers from the Emergency Services Department—during which time they again could have secured the necessary warrant. Even barring that course of action, the police could simply have staked out the apartment while waiting for a judicial officer to authorize entry into the home. The difference between action which would have been constitutionally proper and that which was taken is not slight. Had the police in fact obtained a warrant, limiting the scope of their activities after entry, their patently illegal actions in conducting a full-blown search of the premises might have been avoided (cf. *Mincey* v. *Arizona*, —— US ——, 46 USLW 4737, 4739).

In sum, a serious incongruity between the Fourth Amendment protections applicable to search and arrest has now been created. If the guarantee afforded by the Fourth Amendment is to remain viable, the police must be required, in absence of exigency, to obtain a warrant from a disinterested judicial officer before invading domestic perimeters for whatever purpose. The abuses which might result from the holding of the majority are legion. Probable cause in the eyes of a police officer is a somewhat amorphous concept and the privacy of our citizenry is far too cherished a right to be entrusted to his discretion. Where there is no warrant authorizing entry into the home and no circumstances necessitating immediate police action, it is constitutionally imperative to preclude law enforcement officers from effecting a forcible or nonconsensual entry into the home to make a felony arrest.

Accordingly, I vote that the orders of the Appellate Division should be reversed and, in each case, a new trial granted.

Chief Judge BREITEL and Judges JASEN and GABRIELLI concur with Judge JONES; Judges WACHTLER, FUCHSBURG and COOKE dissent and vote to reverse and order a new trial in separate dissenting opinions.

In *People* v. *Payton*: Order affirmed.

Chief Judge BREITEL and Judges JASEN and GABRIELLI concur with Judge JONES; Judges WACHTLER and FUCHSBERG dissent and vote to reverse and dismiss the indictment in separate dissenting opinions; Judge COOKE dissents and votes to reverse and order a new trial in another dissenting opinion.

In *People* v. *Riddick*: Order affirmed.

COURT OF APPEALS
STATE OF NEW YORK

No. 259

[Filed Jul. 19, 1978]

The Hon. Charles D. Breitel, Chief Judge, Presiding

THE PEOPLE &C., RESPONDENT

vs.

THEODORE PAYTON, APPELLANT

REMITTITUR (Payton)

The appellant in the above entitled appeal appeared by William E. Hellerstein and William J. Gallagher, The Legal Aid Society; the respondent appeared by Robert M. Morgenthau, District Attorney of New York County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Jones, J. All concur except Wachtler, Fuchsberg and Cooke, JJ., who dissent and vote to reverse and order a new trial in separate dissenting opinions.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 11, 1978.

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

No. 258

THE PEOPLE &C., RESPONDENT

vs.

OBIE RIDDICK, APPELLANT

REMITTITUR (Riddick)

The appellant in the above entitled appeal appeared by David A. Lewis and William E. Hellerstein, The Legal Aid Society; the respondent appeared by John J. Santucci, District Attorney, Queens County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Jones, J. All concur except Wachtler and Fuchsberg, JJ., who dissent and vote to reverse and dismiss the indictment in separate dissenting opinions and Cooke, J., who dissents and votes to reverse and order a new trial in a dissenting opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 11, 1978.

SUPREME COURT OF THE UNITED STATES

Nos. 78-5420 and 78-5421

THEODORE PAYTON, APPELLANT

v.

NEW YORK; and

OBIE RIDDICK, APPELLANT

v.

NEW YORK

ON CONSIDERATION of the motions of the appellants for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motions be, and the same are hereby, granted.

December 11, 1978

SUPREME COURT OF THE UNITED STATES

Nos. 78-5420 and 78-5421

THEODORE PAYTON, APPELLANT

v.

NEW YORK; and

OBIE RIDDICK, APPELLANT

v.

NEW YORK

APPEALS from the Court of Appeals of the State of New York.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted limited to question 1 presented by the jurisdictional statement in No. 78-5420. Probable jurisdiction is noted in No. 78-5421. The cases are consolidated and a total of one hour is allotted for oral argument.

December 11, 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

NO. 78-5420

THEODORE PAYTON,

Appellant,

v.

NEW YORK,

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

Mot dismiss or affirm

MOTION TO TREAT IN PART AS A PETITION FOR A WRIT OF CERTIORARI AND DENY REVIEW, AND TO DEFER CONSIDERATION OF THE REMAINING QUESTION

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IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

NO. 78-5420

THEODORE PAYTON,

Appellant,

v.

NEW YORK,

ON APPEAL FROM THE NEW YORK
COURT OF APPEALS

MOTION TO TREAT IN PART AS A PETITION FOR A WRIT OF CERTIORARI AND DENY REVIEW, AND TO DEFER CONSIDERATION OF THE REMAINING QUESTION

Preliminary Statement

On this appeal from a decision of the New York Court of Appeals, appellant challenges the constitutionality of statutory provisions authorizing police officers to enter a dwelling without a warrant in order to effect an arrest for a felony based upon probable cause. (Jurisdictional Statement, p.2, Question 1). Appellant also presents additional questions concerning the "inevitable discovery" exception to the exclusionary rule. (id., Questions 2 and 3).

1. The "inevitable discovery" issue is not within this Court's jurisdiction as an appeal, and certiorari review should be denied. It is unlikely that the questions appellant raises concerning the principle of "inevitable discovery" would be reached in this case. Rather, if review were granted, the focal issue would be whether the facts of this case come within the principle of "attenuation" recently enunciated in United States v. Ceccolini, 435 U.S. 268 (1978)--that a "live witness" who voluntarily supplies evidence may dissipate the taint which would otherwise result from some antecedent illegal act.

2. With respect to the first question presented, this is one of three appeals in which it is contended that New York statutory provisions which permit entry to arrest without a warrant are unconstitutional as applied to cases where there are no exigent circumstances. Riddick v. New York (Dkt. No. 78-5421). Gonzalez v. New York (Dkt. No. 78-5422). The Riddick case squarely presents that constitutional issue. This case does not, for two reasons. First, the record here is incomplete on the issue of exigent circumstances and does not portray a concrete factual situation in which to evaluate the constitutionality of the statute as applied to this case. Second, there is serious doubt whether, if a rule requiring arrest warrants were to be adopted now, the remedy of the exclusionary rule should by applicable to this case. The entry here took place pursuant to a statute at a time when there was no serious question about the constitutionality of the rule, implicitly approved in prior decisions of this Court, that a warrant is not

required for a daytime entry to arrest for a felony based upon probable cause.

Accordingly, appellee moves pursuant to Rule 16(d) to defer consideration of this appeal pending determination of the appeal filed in the Riddick case. Depending on the decision in that case, remand to the state courts may be appropriate for consideration of the additional issues involved in this case.

STATEMENT OF THE CASE

Introduction

On Monday morning, January 12, 1970, Theodore Payton, armed with a rifle, walked into a gas station in Manhattan and forced the manager, Roberto Carassas, to hand over approximately a thousand dollars of the weekend receipts. When Payton also demanded the money in the office safe, Carassas resisted and in the ensuing struggle was fatally wounded by one of the two .30 caliber bullets fired from Payton's rifle. Payton fled with the rifle and the thousand dollars.

Two witnesses at the scene of the crime knew Payton and recognized him despite the mask he was wearing. Melvin Gittens had known Payton since childhood. Gittens observed Payton as he walked past Gittens on the way into the gas station office. Gittens also saw Payton inside the office, where he heard Payton speak to the manager and to Gittens himself. Raymond Williams also had considerable opportunity to observe Payton and to hear Payton speaking to him.

Later on the day of the killing, Payton admitted to a friend, Jesse Leggett, that he had committed the

crime. When Leggett saw Payton again the next day, Payton, who was carrying a rifle in a gun case, said he was going to get rid of the rifle. Leggett recalled that Payton had said he had purchased a .30-30 Winchester rifle in upstate New York in November 1969, and that Payton had taken the rifle hunting with Leggett in December 1969, a month before the murder.

Sidney Roseman, the owner of a sporting goods store in Peekskill, New York, had sold a .30-30 Winchester rifle, some .30-30 shells and other equipment to a man who identified himself as Theodore Payton. The sale, made on November 19, 1969, was recorded on a form known as a "Firearm Transaction Record," which Roseman filled out and kept on file as required by federal regulations. Handwriting analysis showed that the signature on the form, written in Roseman's presence, was appellant's.

Although the murder weapon was never recovered, ballistics analysis showed that a .30 caliber shell casing which Payton had in his apartment on January 15, 1970, had been fired from the same rifle as two .30 caliber shell casings recovered at the scene of the crime.

The foregoing evidence was presented at Payton's

trial in June 1974.* The defense presented no witnesses. Payton was found guilty of felony murder. The jury was unable to reach a verdict on intentional murder. Payton was sentenced on October 29, 1974, to a term of fifteen years' to life imprisonment, which he is presently serving.

The conviction was affirmed by the Appellate Division, First Department, without opinion, 55 A.D. 2d 859 (December 16, 1976), and by the New York Court of Appeals in an opinion reported at 45 N.Y. 2d 300 (June 15, 1978).

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*In describing the evidence at trial, appellant is mistaken in asserting that Gittens initially told the police that he could not recognize the perpetrator. (Jurisdictional Statement, p. 4). In fact, on the day the crime was committed, Gittens told both his sister and his attorney that he had recognized the holdup man. (Gittens: T. 378, 403; J. Yarrell: T. 413-414; Stein: T. 460-465). The attorney, who was representing Gittens on a homicide charge unrelated to this incident, said that he, rather than Gittens, should handle disclosure of that information, and the attorney proceeded to contact the District Attorney's Office. Accordingly, when Gittens was interviewed by Detective Malfer on January 12, Gittens described the man in detail, but did not give the man's name. (Gittens: T. 292-293, 304, 367-376, 378, 386, 387; Stein: T.460-467).

As with Gittens, appellant is mistaken in stating that Williams initially told the police that he could not recognize the perpetrator. (Jurisdictional Statement, p. 4). Williams described the man but did not at first give the man's name, fearing that if he became involved his criminal record would become known to his employer and he would be fired (William: T.500-501, 532-533, 538-542, 545-546, 552-553).

Implying that Gittens somehow lacked credibility because he cooperated with the District Attorney's Office on this matter, appellant states that Gittens received a five-year sentence on the unrelated homicide charge he was facing. (Jurisdictional Statement, p. 4, 2d footnote). Appellant fails to note that Gittens sentence was imposed over the objection of the District Attorney's Office, which sought a more severe sentence (Gittens: T.294-295, 337-349; Stein: T.455-456, 467-70).

["(T.___)" indicates pages of the trial minutes, which are contained in volumes 1 and 2 of the original record].

On appeal in the state courts and in this Court, Payton has sought to suppress, first, the shell casing he had in his apartment and, second, evidence concerning his purchase of a Winchester rifle shortly before the murder. The .30 caliber shell casing was observed in plain view when police officers entered his apartment in order to arrest him for the murder. Appellant contends that this evidence should have been suppressed on the ground that the officers did not enter his apartment lawfully. New York follows the long standing and widely accepted rule, developed at common law, that a police officer may enter a dwelling to arrest for a felony based upon probable cause.* Appellant contends that that this statute should be declared unconstitutional as applied to his case, and that the mandatory warrant procedure which governs searches in the absence of exigent circumstances should be extended to entries into a dwelling to effect an arrest.

Appellant also seeks to suppress the evidence provided by Sidney Roseman, the owner of the Peekskill gun store, concerning Payton's purchase of a .30-30 Winchester rifle in November 1969. According to Payton, Roseman's identity was the tainted "fruit" of a bill of sale illegally seized from Payton's apartment. The People have conceded that the bill of sale was not observed in plain view and was therefore seized illegally. The People have maintained, however, that Roseman's evidence was admissible under either of two exceptions to the exclusionary

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*The text of the statute in effect at the time of this entry (Code of Criminal Procedure, Sections 177 and 178) is set forth in the Jurisdictional Statement at pp. 2-3.

e: the principle of "attenuation" as it applies to evidence provided by live witnesses, and the principle of "inevitable discovery."

The Record Concerning the Entry into Payton's Apartment and the Observation of the Shell Casing in Plain View

At the pretrial hearing held on appellant's motion to suppress evidence found in his apartment, appellant's contention was that the officers entered his apartment in order to search it, and that a search warrant was required. The People maintained that the officers entered the apartment to arrest Payton as authorized by statute. Hence, although other evidence not found in plain view had to be suppressed, seizure of the shell casing which was observed in plain view was proper.

Thus, the hearing focused on the purpose of the officers in entering the apartment and on whether the shell casing was observed in plain view. The constitutionality of the statute permitting the police to enter the apartment without a warrant in order to effect an arrest was not raised by Payton until after the hearing. Accordingly, the record does not contain a clear picture of whether exigent circumstances would have excused the police from obtaining an arrest warrant, assuming one was constitutionally required.

The record shows that at a meeting held on January 14, 1970, two days after the murder, Gittens, accompanied by his attorney, informed authorities that he had recognized the masked killer whom he had known since childhood. Also on January 14, Leggett--taken into custody in the Bronx on unrelated charges--volunteered

that he had information concerning this crime. Detective Malfer went to talk to Leggett, who pointed out to the detective the building in the Bronx where Payton lived. (Malfer: SH.122-123, 139, 161-164; A20-21, 37, 59-62)*. Detective Malfer did not go up to Payton's apartment at that time (Leggett: T.788), but continued his investigation, interviewing Leggett further at the detective's office in Manhattan and at one point showing him a series of photographs (Leggett: T. 817).

The record does not show at what time Payton's address was pointed out to Detective Malfer, why the detective did not attempt to arrest Payton at that time, what further investigation the detective subsequently conducted, when the decision was made to go to Payton's apartment, or whether the officers' trip to Payton's apartment the following morning, January 15, was precipitated by any particular event, e.g., the receipt of information indicating that Payton was in the apartment at that time.

In any event, at approximately 7:30 a.m. on January 15, Detective Malfer, accompanied by his sergeant and three other detectives (SH. 123-234, 142-143; A21-22, 40-41), went to Payton's apartment. A light was visible beneath the bottom of the apartment door and a radio was heard playing music inside (SH. 125, 144; A23, 42). When one of the officers knocked, there was no

*"(SH.___)" indicates pages of the pre-trial suppression hearing minutes, which are contained in volume 1 of the original record. Where pages of the original record were reproduced in Appellant's Appendix filed in the New York Court of Appeals, parallel page references to the Appendix (indicated as "A__") are provided following the references to the original record, e.g. "(SH. 107-111; A5-9)."

response (SH. 126-127, 144; A24-25, 42). The metal door was locked, and the detectives called for assistance in opening it. (SH. 127, 146; A25, 44). Half an hour later, at approximately 8:00 a.m., Emergency Services personnel arrived and forced the door open, using crowbars (SH. 149-150; A 47-48).*

Detective Malfer and other officers then entered the apartment and checked the rooms, looking for Payton in order to arrest him for the murder (SH. 127, 128, 151-152; A25, 26, 49-50). In the living room, Detective Malfer saw in plain view on top of a stereo set a .30 caliber shell casing (SH. 129, 134, 158-160; A27, 32, 56-58). Knowing that Roberto Carassas had been killed with a .30 caliber bullet (SH. 165-166; A63-64), the detective took the shell casing (SH. 135; A33) for examination by ballistics experts. Payton was not found in the apartment.

The officers then conducted a full-scale search of the apartment, examining the contents of drawers, cupboards and closets (SH. 153-154, 155; A51-52, 53). They found a shotgun and a bandolier with buckshots for the shotgun (SH. 129, 155-156; A27, 53-54), several photographs, and a bill of sale for various items, including a Winchester rifle (SH. 135-136; A33-34). The objects found during this search were removed from the apartment (SH. 160, 164-165; A58, 62-63), but prior to the hearing the District Attorney's Office,as noted, conceded that this evidence was seized illegally and accordingly it was ordered suppressed.

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*Appellant is mistaken in stating that an hour passed before Emergency Services personnel arrived (Jurisdictional Statment, p. 3). At trial, Detective Malfer testified that Emergency Services officers arrived approximately half an hour after they were called (T.901).

The hearing judge found that Detective Malfer was testifying truthfully that the officers entered the apartment to arrest Payton and that the shell casing was observed in plain view (see SH. 114, 146-47; A12,44-45). The judge ruled that the entry was authorized by the arrest statute and that seizure of the shell casing was proper. (Decision of Birns, J., June 4, 1974, 84 M. 2d 973; Appellant's Appendix C). The judge made no findings on the issue of whether there were exigent circumstances which would excuse obtaining an arrest warrant if one was required. That issue was not litigated at the hearing.

The Court of Appeals ruled that the entry into Payton's apartment to arrest him was lawful although no warrant was obtained. The court was required to consider the constitutionality of the arrest statute since this case was argued together with People v. Riddick (in which an appeal to this Court has also been taken). In the Riddick case, it was clear that there were no exigent circumstances. Nine months before the police entered Riddick's apartment to arrest him, the victims of two robberies had been shown a photograph of Riddick and identified him as the perpetrator; two months before the arrest, the investigating detective had learned Riddick's address from his parole officer. The majority of the court ruled that entry to arrest for a felony based upon probable cause was permissible without a warrant though no exigent circumstances were present. Having decided that issue, the majority did not resolve the question of whether there were exigent circumstances in this case.

One judge, who dissented on other grounds, concluded that arrest warrants are generally required and accordingly found the entry in the Riddick case to be unlawful. However, he concluded that exigent circumstances were present in this case (Opinion of Wachtler, J., Appellant's Appendix A, p. 11). Two judges concluded that arrest warrants are required and that exigent circumstances were not present in this case or in Riddick. (Opinions of Fuchsberg and Cooke, J.J., dissenting, Appellant's Appendix A, pp. 14, 15-21).

The Hearing Concerning the Admissibility of Sidney Roseman's Evidence

During the trial, the defense objected that the evidence provided by Sidney Roseman, which concerned Payton's purchase of a .30-30 Winchester rifle in Peekskill before the murder, was the tainted "fruit" of the bill of sale which had been found in Payton's apartment and which had been ordered suppressed prior to trial. The People did not dispute that Detective Malfer had learned of the Peekskill gun store from the bill of sale.* However, Roseman testified at trial that on numerous occasions he had received inquiries from state and local police, and insurance companies, concerning gun sales, and that in response "we pull out the firearms record" which federal regulations required that he keep on file.** (Roseman: T. 954-55; A139-140). A post-trial hearing

*The bill of sale named the store, not Roseman, as appellant suggests in his Jurisdictional Statement at p. 17, n.6.

** The instructions on the printed "Firearm Transaction Record" form state:

> "Upon completion of the firearm transaction, the transferor [defined under Definitions, No. 1, as the "person selling or otherwise disposing of the firearm"] must make a part of his permanent records the original Form 4473 [Firearms Transaction Record] recording that transaction and any supporting documents. (Peo. Exh. 5 at

was ordered to supplement the trial record with respect to the People's contention that Roseman's evidence would have "inevitably" been discovered.

At the post-trial hearing, Detective Malfer described the normal investigative procedure he would have followed if he had not had the bill of sale found in Payton's apartment. Ballistics evidence from the scene of the crime showed that the deceased had been killed by a .30-30 Winchester bullet, and eyewitnesses described the murder weapon as a pump action, lever-type rifle. Since the rifle was not recovered, it was of primary importance in the investigation to attempt to establish whether Payton had owned or possessed such a weapon (Malfer: T.849; PTH.* 15-16, 17, 19-20, 22; A155-156, 157, 159-160, 162).

Independent of the bill of sale, Detective Malfer knew from Payton's friend, Leggett, that Payton had purchased a .30-30 Winchester rifle in upstate New York in November 1969 (Malfer: PTH. 17, 23 (A157,163); Leggett: T.670-71, T.740-741; PTH. 8-11 (A148-151)). Accordingly, the detective would have contacted the Bureau of Alcohol, Tobacco and Firearms in the United States Department of the Treasury in an effort to trace the purchase of a rifle by Payton in upstate New York. (PTH: Malfer: 17-18, 22-24) (A157-158, 162-164)).

The federal agency maintained a list of the approximately eleven hundred licensed gun dealers in the State of New York, including the New York City and Long Island area which was eliminated by Leggett's information. There was a separate list for the Westchester-

*"(PTH__)" indicates pages of the minutes of the post-trial hearing, which was held on October 15, 1974.

Putnam County area (PTH: Brady: 29-31, 34-35 (A169-171, 174-175); Pec. Exh. 3), which was just north (or "upstate" in Leggett's words) from where Payton lived.*

Using the lists available from the federal agency, Detective Malfer would have proceeded to communicate with the gun dealers concerning purchase of a rifle by Payton. (PTH: Malfer: 20; A160). This was a normal investigative procedure in the circumstances of this case where the murder weapon had not been recovered (PTH: Malfer: 17, 20 (A157, 160)). Since Payton had used his own name in purchasing the rifle, it would have been simply a matter of time before the detective's inquiries

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*In addition, Leggett had been with Payton when he had bought another gun at "Tony's" in Ossining, New York which is in Westchester County. (Leggett: PTH. 9-10; A149-150). While the hearing judge stated that it is not clear whether Detective Malfer actually had this information prior to trial (A189; Appellant's Appendix D, p.1), the information was clearly available to the detective from Leggett in January 1970 (see Malfer: PTH. 15, A155; Leggett: PTH. 9-10, A149-150). Inquiry to local police in Ossining concerning gun shops in the vicinity would have revealed to the detective that the closest store to "Tony's" was Roseman's store in Peekskill on Route 9, a fifteen minute drive away (Malfer: PTH. 27 (A167); Brady: PTH. 31-34 (A171-174)).

reached Roseman, whose practice it was to respond to such communications from law enforcement agencies.*

The hearing judge concluded that "the district attorney has proven by a preponderance of the evidence that the unlawful seizure of the bill of sale was not a sine qua non of the discovery of the Peekskill gunshop dealer." Rather, police contact with the Peekskill gun shop dealer was "inevitable". (Minutes of October 29, 1974, p.9, A194; Appellant's Appendix D p. 3).

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*Detective Malfer had previously made similar types of inquiries to locate pieces of evidence (PTH: Malfer: 21; A161). Payton makes much of Malfer's answer on cross-examination that he had never contacted "every" gun dealer in New York State or heard of an inquiry in which contact had been made with "every" gun dealer in the state (PTH: Malfer: 25; A165). Jurisdictional Statement, pp.7, 14. However, as the majority of the Court of Appeals noted (Opinion, Appendix A, p. 10, n.5), that answer is not inconsistent with the detective's testimony on direct that conducting the inquiry in this case would have been normal investigative procedure. It would rarely be necessary to contact every gun dealer in the state since available information would usually suggest a smaller geographical area in which to concentrate the inquiry. Thus, here, Leggett's information limited the inquiry to the "upstate area". And Payton's residence in the Bronx (and also the information available from Leggett concerning Payton's purchase of a firearm at "Tony's") made the Westchester-Putnam County area a likely place to begin the inquiry.

In the Court of Appeals, Payton did not challenge the validity of the principle of "inevitable discovery" but argued that a higher than "preponderance" standard should be used in applying that principle. The People's first response was that, regardless of its admissibility under the "inevitable discovery doctrine, Roseman's evidence was admissible under the principle of "attenuation" as it applies to live witnesses, which this Court had recently approved in United States v. Ceccolini, 435 U.S. 268 (1978). The Court of Appeals noted this ground but did not rule on it. (see majority opinion, Appellant's Appendix A, p.10, n.6). Instead, the court held that the evidence was sufficient to support application of the "inevitable discovery" doctrine.

In considering the sufficiency of the evidence, all but one of the judges apparently agreed with the People's position that the issue was not the standard of proof used by the trial judge, but whether the evidence was sufficiently persuasive under the strict standard imposed by the "inevitable discovery" doctrine itself. The majority held that the doctrine requires not literal "inevitability" but rather a "very high degree of probability". They concluded that the evidence in this case, which was uncontradicted, met that standard. (Opinion, Appellant's Appendix A, pp.9-10). Two of the dissenting judges disagreed, concluding that the evidence was insufficient to meet the higher standard of "certainty" which they believed the doctrine required. (Opinions of the Wachtler and Cooke, J J., Appellant's Appendix, pp. 12-14, 20). The third dissenter believed that a "reasonable doubt" standard was appropriate. (Opinion of Fuchsberg, J., Appellant's Appendix A, p. 14-15).

MOTION TO TREAT APPELLANT'S PAPERS IN PART AS A PETITION FOR A WRIT OF CERTIORARI AND TO DENY REVIEW

The questions appellant poses concerning the principle of "inevitable discovery" (Jurisdictional Statement, p.2, Questions 2 and 3) do not involve the constitutionality of a statute and therefore are not within this Court's jurisdiction as an appeal. 28 U.S.C. Sec. 1257 (2). Certiorari review of these matters should be denied.

The New York Court of Appeals considered Mr. Roseman's testimony and the Firearms Transaction Record he provided to be admissible because that evidence would have been "inevitably discovered" even if the police had not unlawfully seized a sales slip from Payton's apartment. This Court has not decided whether evidence which has been obtained as a result of an antecedent illegal act is nonetheless admissible if that evidence would have been obtained lawfully in any event. Compare Brewer v. Williams, 430 U.S. 387, 406-407 at n. 12 (1977), with Fitzpatrick v. New York, 414 U.S. 1050 (1973) (White, J., dissenting from a denial of certiorari). Even if the issue of the validity of the "inevitable discovery" doctrine is properly presented here despite appellant's failure to challenge the doctrine in the Court of Appeals, it is unlikely that this Court would ever reach that issue in this case. Regardless of the correctness of the decision by the Court of Appeals, Roseman's evidence would be admissible under this Court's recent ruling in United States v. Ceccolini, 435 U.S. 268 (1978).

In the Ceccolini case, the evidence given by a witness was discovered solely as a result of an illegal search. It was accepted by this Court that the evidence would not, as in this case, have been discovered "inevitably." (435 U.S. at 273). Nonetheless, the Court held that under the principle of "attenuation", the evidence provided by the "live witness" would not be deemed a "fruit" of the illegal search.

In view of the decision in the Ceccolini case, the admissibility of Roseman's evidence would turn, not on the applicability and validity of the "inevitable discovery" doctrine, but rather on the applicability of the principle of "attenuation." There is no reason for this Court, so soon after Ceccolini, to hear another case in which the parties debate the application of that principle to another set of facts. This case presents merely such a factual dispute. Indeed, there is every reason to apply the "attenuation" principle here.

Thus, Roseman's testimony at appellant's trial in 1974 was freely given, and was not coerced or induced by the bill of sale found in Payton's apartment four years earlier. Roeman willingly cooperated with the police in accordance with his practice of providing information about gun sales upon request from various agencies. There is no showing that the bill of sale was used in interviewing Roseman; nor is there any indication that the police searched Payton's apartment for the purpose of finding a knowledgeable witness against him.*

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*Thus, this case does not present the question, left open in Ceccolini, whether the exclusionary rule should apply when an illegal search is conducted for "the specific purpose of discovering potential witnesses." 435 U.S. at 276, n. 4.

Furthermore, Roseman's "individual human personality" made him capable of receiving a communication directed by police to gun dealers on the federal agency's list, and he was willing to look through his files and respond. Thus, Roseman was a vital force intervening between the illegality and the evidence he provided.

Moreover, as a witness, Roseman could, and did, give a living account of the sale, which he had personally made. This account went beyond the "cold record" of the Firearm Transaction Record in several important respects. For example, Roseman testified that, because of the amount of the sale, he "threw in" a "soft black [gun] case" which did not have a handle and had to be carried under the arm (Roseman: T. 596-597).* Roseman also testified that he had seen the purchaser sign the Firearm Transaction Record (Roseman: T. 597).** And Roseman was questioned at length concerning

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*Several eyewitnesses testified that the holdup man carried under his arm a black leather case, from which he took the rifle used in the killing. And Leggett testified that Payton was carrying such a case the day after the killing.

**A hand-writing expert--another live witness--testified that appellant had signed this document.

the Poughkeepsie residence claimed by Payton when he purchased the rifle. Thus, as the trial judge stated, Roseman was a "key witness" and provided testimony that was "very damaging" to the defense. (PTH. 6-7; A146-147).

Payton disputes whether the "attenuation" principle should be applied to Roseman's evidence. He points to what he claims are factual distinctions between this case and Ceccolini. For example, he notes that Roseman provided a document (the Firearms Transaction Record) as well as testimony, and he argues that Ceccolini is distinguishable on the ground that "the Firearms Transaction Record was used to examine Roseman at trial whereas the policy slips in Ceccolini were not used to question Hennessey." (Jurisdictional Statement, p. 15, n.5).

However, since the policy slips in Ceccolini were found during an illegal search, it would have been significant in applying the principle of "attenuation" if they had been used to question the witness in that case. In contrast, in this case, the Firearms Transaction Record which Roseman was asked about at trial was not itself illegally seized, but was provided by Roseman and thus was further removed from the "primary illegality" than Roseman himself. Accordingly, the questioning of Roseman about that document does not significantly alter the application of the "attenuation" principle to the facts of this case. And, while appellant (Jurisdictional Statement, p. 15, n.5) disagrees with our analysis of the extent to which Roseman's testimony would have been damaging to the defense without the Firearms Transaction Record, that dispute would concern at most merely another circumstance in the "attenuation" analysis.

In sum, if certiorari review were granted, the focal issue would not be the questions appellant poses concerning the principle of "inevitable discovery", but rather the principle of "attenuation" as it applies to situations involving live witnesses.* Review of another case involving that principle, so recently addressed in Ceccolini, is not warranted.

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* We note that appellant is mistaken in asserting that there is conflict between the New York Court of Appeals and the Second Circuit with respect to the principle of "inevitable discovery." In Ceccolini itself, the Second Circuit approved not only that principle, but also the "preponderance" standard use by the trial court. The Second Circuit quoted with approval the District Court's statement that the government had the "burden of proving by a fair preponderance of the credible evidence that it would have inevitably come across her [the witness] in the course of its investigation." 542 F. 2d 136, 141 (2d Cir. 1976), rev'd on other grounds, 435 U.S. 268 (1978). See also United States v. Falley, 489 F. 2d 33, 40 (2d Cir. 1973), where the court applied the "inevitable discovery" principle, stating that "it would have been only a question of time before the government by so-called saturation investigation, or otherwise, would have discovered the broker and the importation documents."

MOTION TO DEFER CONSIDERATION OF THE REMAINING QUESTION UNTIL THE APPEAL IN RIDDICK v. NEW YORK IS DECIDED

This is one of three appeals to this Court challenging the constitutionality of New York statutes authorizing police officers to enter a dwelling without a warrant in order to effect an arrest based upon probable cause. Riddick v. New York (Dkt. No. 78-5421). Gonzalez v. New York (Dkt. No. 78-5422). In each of these cases, it is contended that the statutory provisions are unconstitutional as applied to cases in which there are no exigent circumstances excusing the failure to obtain a warrant. The Riddick case squarely presents that issue. This case does not. Accordingly, we respectfully request that consideration of this case be deferred pending determination of the appeal in Riddick.

There is no semblance of exigent circumstances in the Riddick case. Before the police entered Riddick's apartment to arrest him, the better part of a year had passed since Riddick had been identified by his victims. Two months had elapsed since Riddick's address had been furnished to the detective by Riddick's parole officer.

In contrast, this case does not present the constitutional issue squarely and would be better left until the main issue is settled, as it must be in Riddick. There are two reasons why this is so.

First, this record does not portray a concrete factual situation in which to evaluate the constitutionality of the statute as applied. The issue of exigent circumstances was not litigated at the pretrial suppression hearing.* The record does not show the course of the investigation from the "afternoon" when Detective Malfer learned where appellant lived, until the following morning when the detectives went up to his apartment. Accordingly, in this case the claim that the statute is unconstitutional as applied is at best an abstract proposi-

* See above, p. 7. In the Court of Appeals, the People argued that appellant had not preserved for review his claim that exigent circumstances were required to justify entry without a warrant for the purpose of arrest. The People met their burden of going forward at the hearing by proving that the entry was proper under the arrest statute, the constitutionality of which is presumed. While counsel then representing appellant made a remark which could be interpreted as a cryptic reference to the issue of exigent circumstances, the record indicates that neither the judge nor the prosecutor were aware during the hearing that appellant was seeking to suppress the shell casing on the theory that exigent circumstances had to be shown to justify the entry into the apartment. Thus, the judge ruled that questioning concerning events prior to the entry was merely preliminary, and the People's objection to defense questioning about the course of the investigation was sustained.

Accordingly, we contended that since appellant had failure to alert the People to the need to introduce evidence beyond that required to establish the lawfulness of the entry under the statute, appellant was precluded from urging lack of proof on such an issue as a ground for reversal on appeal. Since the Court of Appeals did not accept our waiver argument and reached the question of the statutes's constitutionality, we have not renewed that argument on this motion. However, the fact remains that the record is devoid of concrete facts on the issue of exigent circumstances.

Appellant's allusions to the constitutional issue may have been sufficient to avoid a waiver, so that the issue is now open to him. But, the People relied on the statute and there was no clear indication that appellant was challenging its constitutionality or putting exigent circumstances in issue. Accordingly, the People should not be precluded from requesting a hearing on the issue of exigent circumstances if a decision by this Court, unlike the decision of the Court of Appeals, were to make a determination of that issue necessary.

tion. Indeed, the record suggests, as far as it goes, that in appellant's case the application of the statute would be constitutional regardless of the general proposition he advances.

Here, the police were investigating a murder, committed only two days before, when they received information that appellant had committed the crime. They pursued the investigation. The next morning, when they went to appellant's apartment, it appeared that he was hiding inside. At that point, "a clear showing of probable cause existed," and there was "strong reason to believe that the suspect was in the premises being entered and that he would escape if not swiftly apprehended."* They then entered the apartment in order to arrest him for the murder.

In these circumstances, Judge Wachtler--one of the three judges of the Court of Appeals who accepted the general proposition advanced by appellant and voted to reverse in Riddick because there was no exigency there--concluded that application of the statute to appellant's case was constitutional. In view of the "continuous and intensive investigation" of the murder, Judge Wachtler considered it reasonable for the police to "continue their pursuit into the apartment in order to take a dangerous killer into custody." (Opinion, Appellant's Appendix A, p. 11).

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*These findings, which were based on the pretrial suppression hearing, were made not in connection with an "exigent circumstances" exception to an arrest warrant requirement, but were made in connection with a different requirement--the duty imposed on an officer by the arrest statute (Code of Criminal Procedure, Section 178) to give notice of purpose and authority be given before a forcible entry. (Decision of Birns, J., June 4, 1974. Appellant's Appendix C (p. 2).

Thus, the presence of exigent circumstances is suggested by the circumstances of this case, but is not readily resolved because the facts in the record are so sparse. In contrast to both this case and Riddick, the record in the third appeal (Gonzalez v. New York) does present an issue concerning the scope of an "exigent circumstances" exception if a rule requiring arrest warrants were to be adopted. In the Gonzalez case, the police entered Gonzalez' apartment to arrest him on drug charges after a police weapon was fired in the course of arresting an accomplice outside the apartment. Gonzalez' theory is that the police could have obtained a warrant a few hours earlier when probable cause to arrest Gonzalez developed during negotiations by an undercover officer for purchase of the drugs. The State replies that there was no duty to obtain a warrant when probable first arose, particularly since at that time there was only probable cause to arrest Gonzalez for a sale of a smaller quantity of drugs that that being negotiated.

In sum, the main constitutional issue must be settled in the Riddick case, in which it is clear that there were no exigent circumstances. Depending on that decision, this appeal may then either be dismissed for want of a substantial question, or consideration may be given to remanding this case to the state courts so they may pass upon the factual and legal questions concerning the issue of exigent circumstances before this Court is asked to do so.

Second, in this case consideration of the main constitutional question is complicated by serious doubt whether a rule requiring a warrant, if adopted now, should be applicable to the entry of police officers into appellant's apartment in January 1970. Here, detectives were engaged in prompt and continous investigation when they entered appellant's apartment during the daytime to arrest him for murder. They acted in accordance with a century-old statute which codified the common law rule that officers may enter a dwelling without a warrant to affect an arrest for a felony based upon probable cause. At the time, there was no serious question about the constitutionality of their conduct. In fact, entry without a warrant during the daytime had been implicitly approved by this Court. See, e.g., Ker v. California, 374 U.S. 23 (1963); Johnson v. United States, 333 U.S. 10, 15 (1948); cf. Jones v. United States, 357 U.S. 493, 499-500 (1958) (questioning forcible nightime entry without a warrant).

In these circumstances, it is questionable whether the purposes of the exclusionary rule would be served by applying a decision requiring arrest warrants to the entry in this case. If arrest warrants were to be required, such a requirement might well constitute a sufficient departure from prior law so that, like the decision limiting searches incident to arrest, it should not apply retroactively. See Williams v. United States, 401 U.S. 646 (1971). See also People v. Ramey, 16 Cal.3d 263, 276 n.7, 127 Cal. Rptr. 629, 545 P. 2d 1333, 1341, n.7, cert. denied, 429 U.S. 929 (1976) (decision requiring arrest warrants would not be applied retroactively).

The considerations militating against retroactive application of any decision to require arrest warrants are much more serious in this case than in the other two appeals now before this Court. In the Riddick case, the police conduct took place in 1974. In Gonzalez, the conduct took place in 1972. By then, questions had been raised concerning the constitutionality of making an arrest in a dwelling without a warrant in the absence of exigent circumstances. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).

Here, since the entry took place in 1970, before there was any serious question about the constitutionality of the statute authorizing it, suppression of evidence resulting from that entry would not seem to be appropriate unless Payton were the successful party to a decision requiring arrest warrants. As noted, however,

the substantive decision should be made in Riddick because that case rather than this one squarely presents the substantive issue. While Payton's appeal is here at the same time as the appeals taken by Riddick and Gonzalez, this Court may select the case in which it will decide whether to enunciate a new constitutional principle, even though the consequence of such a choice is that parties to other pending cases would not then receive the benefit of a decision adopting the new principle. Thus, in Johnson v. New Jersey, 384 U.S. 719 (1966), this Court declined to apply the principles of Miranda v. Arizona, 384 U.S. 436 (1966), to Johnson even though his case not only was pending at the same time as Miranda but had been argued with the four cases decided under the title of Miranda.*

In sum, the main constitutional question should be settled in the Riddick case, which presents the issue in a straightforward and clearcut way. In this case, the issue is not squarely presented because the record does not show clearly whether or not there were exigent circumstances. There is also serious doubt whether, since the entry here took place in 1970, a rule requiring arrest warrants should apply to this case. Accordingly, consideration of this case should be deferred until

*While the Johnson case involved certiorari review of a denial of collateral attack in state court, nevertheless, the retroactivity principles enuciated in Johnson did not turn on whether a case was on direct appeal as distinguished from collateral review.

the Riddick case is decided. If the decision in Riddick requires that the additional issues involved in this case be reached, then it would be appropriate to consider remanding this case to the New York Court of Appeals so that court may consider those issues before this Court is asked to do so.

CONCLUSION

Review should be denied of questions 2 and 3 (Jurisdictional Statement, p.2), which are within this Court's certiorari jurisdiction. Consideration of the remaining question should be deferred pending this Court's determination of the appeal in Riddick v. New York, DKT. NO. 78-5421.

Respectfully submitted,

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November 22, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5420

THEODORE PAYTON,

Appellant,

vs.

NEW YORK,

Appellee.

No. 78-5421

OBIE RIDDICK,

Appellant,

vs.

NEW YORK,

Appellee.

APPEALS FROM THE NEW YORK
COURT OF APPEALS

BRIEF FOR THE APPELLANTS

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OPINIONS BELOW

The opinion of the New York Court of Appeals (A. 69-93) is reported at 45 N.Y.2d 300, 408 N.Y.S.2d 395. The order of affirmance of the Appellate Division, First Department in the *Payton* case (A. 42) is reported at 55 A.D.2d 859. The opinion of the Supreme Court, New York County in the *Payton* case on the pretrial motion to suppress evidence (A. 39-41) is reported at 84 Misc.2d 973, 376 N.Y.S.2d 779. The decision of the Appellate Division, Second Department in the *Riddick* case (A. 67-68) is reported at 56 A.D.2d 937, 392 N.Y.S.2d 848. The opinion of the Supreme Court, Queens County in the *Riddick* case denying the motion to suppress evidence (A. 63-66) is unreported.

JURISDICTION

The judgment of the Court of Appeals in both cases was entered on July 11, 1978. In the *Payton* case, a notice of appeal to this Court was filed on September 12, 1978. In the *Riddick* case, a notice of appeal was filed on September 14, 1978. Both appeals were docketed on September 19, 1978. Probable jurisdiction in both cases was noted on December 11, 1978, and the cases were consolidated.[1] The jurisdiction of the Court rests on 28 U.S.C. §1257(2).

[1] In the *Payton* case, the Court noted probable jurisdiction "limited to Question 1 presented by the jurisdictional statement." (A. 97).

QUESTION PRESENTED

Whether New York statutes which even in the absence of exigent circumstances authorize warrantless, non-consensual and forcible entries for the purpose of arresting a person in his home violate the Fourth and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Payton: Former New York Code of Criminal Procedure §§177, 178 (66 McKinney's Laws of New York, Ch. 4):

CHAPTER IV—ARREST BY AN OFFICER WITHOUT A WARRANT

* * *

§177. *In what cases allowed.*

A peace officer may, without a warrant, arrest a person,

1. For an offense, committed or attempted in his presence, or where a police officer as enumerated in section one hundred fifty-four-a of the code of criminal procedure, has reasonable grounds for believing that an offense is being committed in his presence.

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code.

§178. *May break open a door or window, if admittance refused.*

To make an arrest, as provided in the last section, the officer may break open an outer or

inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

Riddick: New York Criminal Procedure Law, §§150.10(1)(a)(b), 140.15(1)(4), 120.80(1)(4)(5) (11A McKinney's Laws of New York, 1971):

§140.10. *Arrest without a warrant; by police officer; when and where authorized.*

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

§140.15. *Arrest without a warrant; when and how made by police officer.*

1. A police officer may arrest a person for an offense, pursuant to section 140.10, at any hour of any day or night.

* * *

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

§120.80. *Warrant of arrest; when and how executed.*

1. A warrant of arrest may be executed on any day of the week and at any hour of the day or night.

* * *

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

(a) Result in the defendant escaping or attempting to escape; or

(b) Endanger the life or safety of the officer or another person; or

(c) Result in the destruction, damaging or secretion of material evidence.

5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary.

STATEMENT

Payton: No. 78-5420

On the morning of January 12, 1970, Roberto Carassas, the manager of a gas station at 1995 First Avenue on Manhattan's upper East Side, was shot and killed during a robbery. The perpetrator had carried a rifle and had worn a ski mask. On January 16, appellant Payton surrendered himself at Manhattan's

23rd precinct and was placed under arrest for that crime. On March 30, 1970, Payton was indicted by a New York County Grand Jury for felony murder and intentional murder (A. 2).

On May 16, 1974, a pretrial hearing was held on Payton's motion to suppress physical evidence seized by the police from his apartment on January 15, 1970. The sole witness was Detective Mal Malfer, the officer who, on January 12, 1970, was placed in charge of the investigation.

Malfer testified that sometime in the early morning of January 12, 1970, he proceeded to the service station where Mr. Carassas had been shot and there interviewed several witnesses; he also spoke to witnesses who were not at the scene (A. 10, 11). On January 14, Malfer was told by "witnesses" that a "Teddy Payton" was the perpetrator (A. 11, 21). That same day, Malfer was taken by one of the witnesses to the Bronx and the building and apartment in which Payton lived (682 East 141st Street, apt. 5-C) was pointed out to him (A. 34).[2] However, Malfer took no steps that day to effect Payton's arrest; nor did he make any effort to obtain either an arrest or search warrant (A. 21, 34).

Instead, Detective Malfer, accompanied by a police sergeant and three other detectives, returned to Payton's apartment between 7:15 and 7:30 a.m. the

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[2]The record of the suppression hearing does not establish at precisely what time on January 14, Malfer learned where Payton lived because the prosecutor's objection to that question was sustained (A. 33). There was trial testimony, however, that Payton's apartment had been pointed out to Malfer sometime after twelve noon by Jessie Leggett, a prosecution witness (T. 782-783). [References to pages in the record which are not in the Appendix are preceded by the letter "T."].

next day (January 15)[3] (A. 12). He could not recall whether he had made any attempt to ascertain whether Payton was home prior to going to the apartment (A. 23). When the five police officers arrived at Payton's apartment door, Malfer saw a light from beneath the bottom of the door and heard the sound of music from a radio (A. 12, 23, 24). They knocked on the door but received no response (A. 13, 14). The officers tried to force their way in, but could not because the door was made of metal. Consequently, one of the officers left the building to call the Police Department's Emergency Services Division for assistance; Malfer could not recall how long it was before help arrived (A. 14, 24-26).[4]

Malfer testified further that while waiting for the arrival of help from Emergency Services, he had not been concerned about the possibility of escape because he assumed that he and his fellow officers had followed their normal course of covering all avenues of escape: "I assume if we worked the way we normally worked that we had that situation covered" (A. 25). When two officers from Emergency Services arrived, they broke Payton's door open with crowbars. Payton was not at home but upon entering the apartment, the officers divided up and went into different rooms (A. 27, 28).

Although Malfer maintained that their search of the

[3]When defense counsel attempted to learn from Malfer whether, after leaving Payton's building on the 14th, and prior to his return to Payton's apartment the following morning, Malfer had acquired any further information, the prosecution objected and the court sustained the objection (A. 34).

[4]At trial, Malfer testified the time lapse was about a half-hour (T. 901).

apartment was directed at finding Payton, he admitted that, even after he realized Payton was not there, he and his brother officers conducted a search of the entire apartment during which they opened dressers and closets, looked under a mattress and inside cupboards and dumped out the contents of various drawers (A. 28-30). As a result of his search of a closet, Malfer found a shotgun, a bandolier containing fourteen buckshots for that gun, several photographs of Payton with a ski mask, and a sales receipt for the purchase of a Winchester rifle (A. 5, 15). The prosecution conceded that all of these items should be suppressed because they were the fruits of the warrantless search of Payton's apartment (A. 3-7).

However, Malfer also claimed that after he had been in the apartment for a while he saw a .30 caliber Winchester shell casing, which he said was in "plain view" on top of a stereo set, and seized it (A. 15, 32). Defense counsel argued that the police had sufficient time to procure a warrant and that the "plain view" of the casing did not "sanitize" the unlawful entry (A. 8). The prosecution maintained that the police were properly in the apartment to make an arrest authorized by statute (A. 4).

On June 4, 1974, the court rendered a decision in which it suppressed all of the items taken from the apartment except the .30 caliber shell casing. The court held that the casing had been observed in "plain view" while the police were lawfully in the premises pursuant to sections 177 and 178 of the former New York Code of Criminal Procedure (the applicable statute)[5] to

[5]The Court of Appeals noted that the substance of sections 177 and 178 was "continued and expanded in sections 140.10, 140.15 (subd. 4) and 140.25 (subds. 1-3) of the present statute" (A. 77, n.3).

make a warrantless arrest for a felony which they had reasonable grounds to believe Payton had committed (A. 39-41).

On June 6, 1974, Payton's trial commenced before Justice Peter McQuillan and a jury. The prosecution presented testimony from six eyewitnesses at the scene of the crime, two of whom, Melvin Gittens and Raymond Williams, claimed they could recognize Payton because of their prior acquaintance with him although the robber had worn a mask (Gittens: T. 285-286, 306-318, 365, 393-394; Williams: T. 492, 494, 516-522, 570-573, 590-592). Another witness, Jesse Leggett, testified that Payton admitted to him that he had committed the crime and also testified to Payton's purchase and possession of a .30/30 Winchester rifle (Leggett: T. 665-668, 670, 676-677, 733-734, 740).[6] The prosecution also called Sidney Roseman, a Peekskill, New York gunstore owner who testified from his records that Payton had purchased a .30/30 Winchester rifle from him on November 19, 1969 (T. 593-

[6]Gittens, Williams and Leggett all had extensive criminal records. In fact, Gittens had come to the service station for a prearranged meeting with his lawyer to work out the means for arranging his surrender to the police on a homicide charge. He had also been previously convicted of sodomy (T. 294, 305, 319-321, 324-325, 339-348). Williams had four prior felony convictions, the most recent of which had been for attempted murder of a police officer. At the time of trial, he was serving a 10 year sentence and was scheduled to see the Parole Board within a few months (T. 490, 499-500, 533-569). Leggett had prior convictions for various assaults, theft and gambling offenses. At the time of trial, he was facing attempted murder charges for shooting his mother-in-law (T. 672-674, 688-689, 693-696, 743-745, 769-770, 790-792).

597, 600, 603, 949-951).[7]

Although the prosecution established that the deceased had been killed by bullets fired from a .30 caliber Winchester rifle (T. 881-883), the murder weapon was never recovered (T. 849). However, the .30 caliber shell casing seized in Payton's apartment was placed in evidence [People's Exhibit 12] (T. 819-825) as were two shell casings found near the body of the deceased on the floor of the service station (T. 807-813); the prosecution's ballistics expert testified that all three had been fired from the same Winchester rifle (T. 1012-1015, 1021-1022). No defense witnesses were called.

On June 21, 1974, the jury found Payton guilty of felony murder but were unable to agree on the intentional murder count (T. 1304-1305).[8] On October 29, 1974, the court sentenced Payton to a term of 15

[7]The defense challenged Roseman's testimony and the admissibility of the original Firearm Transaction Record (People's Exhibit 5) which Roseman had retained as the "tainted" fruit of the bill of sale found by Detective Malfer in Payton's apartment and which had been suppressed prior to trial. At a post-trial taint hearing, Justice McQuillan ruled that the prosecution had established by a preponderance of the evidence that by following routine police procedures, the police would have discovered the Firearm Transaction Record on their own. By 4-3 vote, the Court of Appeals upheld that ruling under the doctrine of inevitable discovery (A. 78-80). Review of that ruling by this Court was sought in questions 2 and 3 of Payton's Jurisdictional Statement but those questions are not before the Court because of its limitation of review to question 1 (A. 97).

[8]The case was submitted to the jury at 2:45 p.m. on June 20, 1974 and the verdict was not rendered until 6:10 p.m. on June 21. The jury interrupted its deliberations to request re-readings of various portions of the testimony of Leggett, Williams, Gittens and Gittens's lawyer and to request supplemental instructions on reasonable doubt and intentional murder (T. 1217-1267).

years to life imprisonment. The Appellate Division, First Department affirmed the conviction without opinion on December 16, 1976 (A. 42). The Court of Appeals' decision is discussed at pp. 14-16 *infra*.

Riddick: No. 78-5421

On March 14, 1974, Obie Riddick was arrested in his Queens home on a robbery charge (A. 48-49). In the course of a search incident to that arrest, the police discovered heroin and a hypodermic syringe in a dresser drawer in Riddick's bedroom. On April 16, 1974, Riddick was indicted for criminal possesion of a controlled substance and for criminal possession of a hypodermic instrument (A. 45-46). Prior to trial, Riddick moved to suppress the evidence seized from his apartment on the ground, among others, that the arresting officers had failed to obtain either an arrest or a search warrant although they had ample time to do so (A. 61).

The evidence at the suppression hearing, which consisted entirely of the testimony of Detective Fred Bisogno, the arresting officer, showed that the police first obtained probable cause to arrest Riddick in June, 1973, when he was identified from a photographic array as the perpetrator of two robberies (A. 52, 59).[9] At that time, although Riddick was on parole from an earlier conviction (which did not terminate until February 12, 1974), the police claimed that they did not actually learn Riddick's address until January, 1974

[9]It appears that the robberies in question occurred in 1971, over two years before the arrest (see Arraignment Minutes dated April 25, 1974 at 2; Trial Counsel's Affirmation in Support of Appellant's Motion to Suppress).

when they apparently were informed by his parole officer that he lived at 127-08 165th Street, Queens (A. 51, 53, 67).[10] Even then the police did not try to arrest him; nor did they obtain a warrant for his arrest or a search of his home (A. 53, 59).[11] Instead, they waited six to ten weeks before going to his home to arrest him.

On March 14, 1974, at about noon, three police detectives and Riddick's former parole officer went to Riddick's home, a two-family, wood-frame house (A. 48-49). The parole officer entered the house first then returned and signalled to the police that Riddick was home (A. 53, 58). They knocked on the front door which was opened by Riddick's three-year old son. From the doorway, the police saw Riddick in bed and, without first announcing their authority and purpose, proceeded into the bedroom (A. 49, 54.)[12] The police ordered Riddick, who was clad only in undershorts, out of bed (A. 49-50). They then searched the general area of the bed, beneath the mattress, under the pillow case, and inside a dresser which was a few feet away from the bed (A. 50). In the top dresser drawer, the officers discovered a quantity of heroin and a hypodermic syringe (A. 50). The trial court denied Riddick's motion to suppress these items on the ground that the arrest was lawful because it was based on probable

[10]Riddick had lived at this address for two years (Sentencing Minutes dated September 24, 1974 at 6).

[11]The arresting officer claimed he had tried to get a "grand jury" warrant, an arrest warrant founded upon an indictment, but had failed to do so because Riddick had not yet been indicted (A. 53).

[12]Only two of the officers went into Riddick's bedroom (A. 54). The parole officer was in an adjoining room (A. 50) and the location of the other officer is unclear.

cause and the search was reasonable as incident to the arrest (A. 64-66).

On August 19, 1974, Riddick withdrew his plea of not guilty and pled guilty to criminal possession of a controlled substance in the sixth degree (New York Penal Law §220.06), in full satisfaction of the charges in this indictment (See Plea Minutes dated August 19, 1974). On September 24, 1974, the court sentenced him to a 2½ to 5 year term of imprisonment (See Sentence Minutes dated September 24, 1974). By virtue of New York Criminal Procedure Law, §710.70(2) the denial of Riddick's motion to suppress was appealable notwithstanding his entry of a guilty plea. On appeal, Riddick challenged the constitutionality of New York Criminal Procedure Law §§140.15(4) and 120.80(4),(5) which authorized the warrantless arrest in his home. The Appellate Division, Second Department affirmed his conviction on March 28, 1977 with no majority opinion. One justice dissented on the ground that the police failed to comply with the statutory requirement that notice of authority and purpose be given prior to entry (A. 67-68).

The Court of Appeals' Decision

By a 4-3 vote, the Court of Appeals affirmed the convictions in both cases. The majority held that police entry into a home for the purpose of arrest, "if based on probable cause, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances" (A. 69). Noting that this Court has not yet resolved the issue (A. 78), the majority reasoned

that there "was a substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for purpose of making an arrest," as well as a "significant difference in the governmental interest in achieving the objective of the intrusion in the two instances." Thus, it concluded, a warrantless entry for a search will be "both more extensive and more intensive," while entry for arrest will be achieved without "accompanying prying into the area of expected privacy attending [a person's] possessions and affairs" (A. 75). While recognizing that "considered decisions in the federal courts have reached the opposite result" (A. 78), the majority believed there was support for its holding in "[t]he apparent historical acceptance in the English common law of warrantless entries to make felony arrests," in the long-time existence of statutory authority in New York and in other jurisdictions and in the adoption by the American Law Institute of a similar rule (A. 76-78).

The dissenters argued that absent exigent circumstances, the police are constitutionally required to have a warrant to enter a home to arrest or seize a person.[13] Writing on the warrant issue, Judge (now Chief Judge) Cooke emphasized that "from the standpoint of the citizen—to whom the language of the Fourth Amendment is directed—it makes little difference whether the invasion of the privacy of his home was made to effect a warantless arrest or a warrantless search" (A. 89), and

[13]Judge Wachtler believed there were exigent circumstances in the *Payton* case because of the seriousness of the crime and because the police had been in "continuous pursuit" but dissented on the inevitable discovery issue (A. 81-85).

that "neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented here" (A. 92).[14]

SUMMARY OF ARGUMENT

I. The primary interest protected by the Fourth Amendment has always been the privacy of the home. Accordingly, this Court's decisions have long afforded the most stringent protection to the sanctity of private dwellings. The paramount significance of the home in our Constitutional scheme is due to the various meanings the home has for our citizenry. Not only is it a fundamental property interest but, as the center of the personal life of the individual, it is the place in which legitimate expectations of privacy are the highest.

In treating arrests within the home as though they were the same as those made in public places, the Court of Appeals ignored those distinctions between the home and public areas which have long been drawn by this Court. The court erred in holding that the intrusion involved in an entry of the home to arrest is minimal in comparison with that of an entry to search. This error arose from the court's failure to recognize that an entry

[14]Judge Cooke also took specific issue with Judge Wachtler on the existence of exigent circumstances in the *Payton* case, pointing out that the police had been well aware of Payton's identity and address the day before their break-in, that in the intervening period they had ample opportunity to obtain a warrant, and that even on the day of the break-in, they delayed until Emergency Services personnel arrived and thus had yet additional time in which they could have secured a warrant (A. 92).

into the home invades the privacy of all its occupants, that it opens to police scrutiny all items in "plain view," that the manner in which the police enter a dwelling is not designed to ensure a minimal intrusion on privacy, that arrests within the home are accompanied by incidental searches and that if the suspect is not immediately within sight, a search for him may extend throughout the entire premises. When these circumstances are taken into account, the privacy interests implicated in the mere entry of the home are, in fact, more substantial than those in many "searches" which this Court has held are subject to the warrant requirement. Finally, the additional intrusion involved in the seizure of a person within the home brings the total violation of Fourth Amendment interests in these cases well beyond that which is necessary to trigger application of the warrant requirement.

II. The warrant requirement is essential to the protection of the substantial privacy interests affected by arrest entries and is as important here as in the search context. Because police possess exceptionally wide discretion as to whether, when and where an arrest should be made, a power that has been abused, an arrest warrant issued by a neutral magistrate prior to entry into a home reduces the opportunity for police errors or excesses. The warrant limits and delineates the scope of the permissible intrusion and reduces the frequency with which hindsight may affect the evaluation of the reasonableness of the entry. The warrant also protects against otherwise irreparable deprivations of constitutional rights due to erroneous police judgments.

III. Additionally the warrant requirement, in the

limited circumstance of arrests within the home, imposes no undue burden on law enforcement. It does not limit the power to arrest without a warrant when there are exigent circumstances. On the other hand, where immediate action is not necessary, as is true of a substantial number of arrests, the additional brief delay to obtain a warrant is inconsequential. When measured against the seriousness of the intrusion to privacy within the home, law enforcement interests in being free of the warrant requirement are insubstantial.

IV. Unlike the situation in *United States* v. *Watson*, 423 U.S. 411 (1976) where the common law concerning warrantless public arrests was exceptionally clear, the common law as to arrests within the home is far less certain and many authorities required warrants for entries to arrest. At the time of the framing of the Constitution, common law authorities were in disagreement as to the actual rule and nineteenth century authorities also remained divided. Significantly, once modern courts, both federal and state, considered the issue in the context of Fourth Amendment principles, they concluded overwhelmingly that a warrant is required. Consequently, the history of the common law of arrest provides no guidance in this instance to the proper construction of the Fourth Amendment.

V. If our argument that the Fourth Amendment mandates a warrant for arrests within the home is correct, then only exigent circumstances can excuse police failure to obtain one. The Court of Appeals determined that in neither the *Payton* nor *Riddick* cases were exigent circumstances present.[15] However,

[15]In *Riddick*, the District Attorney has conceded that no exigency existed. See, Motion of the District Attorney of Queens County for Divided Argument in No. 78-5421, p. 3.

in *Payton*, one judge thought that because of the nature of the crime and because the police had been in "continuous pursuit" of Payton there were exigent circumstances. This conclusion is without support either in this Court's decisions or in the record. There was no danger of flight, or imminent destruction of evidence, nor was there "hot pursuit." That a homicide had been committed did not alone give rise to exigent circumstances. And the conduct of the investigating detective, who made not one but two trips to Payton's apartment a day apart and delayed entering the second time until other officers could respond with crowbars, indicated that speed was not essential.

VI. Our final point, applicable only to the *Payton* case and one which need not be addressed if the Court accepts our primary argument on the warrant requirement, is that given the absence of exigent circumstances, the entry into Payton's apartment, because of the force employed, was unconstitutional under the Fourth Amendment.

ARGUMENT

NEW YORK'S FORMER AND CURRENT STATUTES AUTHORIZING WARRANTLESS, NON-CONSENSUAL AND FORCIBLE ENTRIES TO ARREST A PERSON WITHIN HIS HOME IN THE ABSENCE OF EXIGENT CIRCUMSTANCES VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS.

Introduction

These cases are before the Court to resolve the

unsettled question of whether the Fourth Amendment permits, in the absence of exigent circumsances, warrantless arrests within the home. Although the issue is still open, a plurality of the Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) stated that:

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

Id. at 477-78.

The decision of the closely divided New York Court of Appeals found no such conflict and held that no warrant was necessary for an entry to arrest. That court thus placed itself at odds with the overwhelming weight of recent judicial authority on the question.[16] Our argument will demonstrate that the court erred in its decision and that the Fourth Amendment, properly construed, mandates reversal because of the high value afforded by it to the privacy interests of the home, the serious intrusion upon those interests by an arrest entry, and the importance of the warrant in safeguarding the interests involved. We shall further demonstrate that there are no legitimate law enforcement purposes served by dispensing with the warrant requirement and that there is nothing in Anglo-American legal history to justify doing so. We conclude by establishing that in both cases at bar there were no exigent circumstances to excuse police failure to obtain a warrant and that in

[16]See nn. 39, 41 *infra*.

the *Payton* case the extreme force actually employed by the police in gaining entry to Payton's apartment constitutes an additional basis for determining the statute authorizing their conduct unconstitutional under the Fourth Amendment.

I. A Warrant Is Required to Arrest a Person in his Home Because Privacy of the Home Is the Paramount Interest Protected by the Fourth Amendment, and Entry of the Home to Arrest Involves a Substantial Invasion of That Interest.

From the adoption of the Constitution to the present, the predominant interest protected by the Fourth Amendment has been the privacy of the home. By its very terms, the Amendment protects the "rights of the people to be secure in their. . . houses. . . against unreasonable searches and seizures," and it has long been recognized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972). The searches and seizures which most deeply concerned the Framers of the Amendment were those involving invasions of the home under authority of writs of assistance. *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977). Indeed, John Adams believed that the movement for American independence was sparked by James Otis's speech against the writs and in defense of the home:

> Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as

> well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.

2 LEGAL PAPERS OF JOHN ADAMS 142-44 (Wroth and Zobel ed. 1965); see, N. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 59 (1937). After the revolution, the Framers confirmed the importance of the home by protecting it under two of the amendments in the Bill of Rights. U.S. Const. Amends. III, IV. From the beginning, then, the "freedom of one's house" has stood at the center of our constitutional protections.

In accordance with these precepts, the Court has affirmed that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). Indeed, since its earliest decisions, the Court has emphasized that the Fourth Amendment applies "to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd* v. *United States*, 116 U.S. 616, 630 (1886). See also, *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1926); *Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447, 479 (1894). The Court has held that "[t]he right of officers to thrust themselves into a home is. . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security. . . " *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). And most recently, it has written that the social and individual interests in "the sanctity of private dwellings [are] ordinarily afforded the most stringent

Fourth Amendment protection" and thus "justify the warrant requirement." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561, 565 (1976).

The high value placed upon the home in our Constitutional framework is attributable to its central and multi-faceted significance in the lives of our citizenry. In the first instance, the home is property, and property rights, especially in a dwelling house, are those "enjoying the longest and strongest support." N. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION, *supra*, at 15, n.9. It is the property interest itself which ensures that a person has a "legitimate expectation of privacy" within the home, an expectation which is grounded in the principle that "[o]ne of the main rights attaching to property is the right to exclude others." *Rakas v. Illinois*, 58 L.Ed.2d 387, 401 n.12 (1978).

But the Fourth Amendment protects far more than the mere property interest in the home:

> if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that is has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.

Poe v. *Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting). As the Court's decisions have underscored, the home is the place to which persons may, in seclusion, repair to exercise undisturbed their rights of marital privacy, speech and thought. *Griswold* v. *Connecticut*, 381 U.S. 479, 484-485 (1965); see, *Stanley* v. *Georgia* 394 U.S. 557 (1969).

In short, the privacy right which the home encompasses is the very essence of the privacy protected by the Fourth Amendment. For, as Mr. Justice Brandeis stated, the Framers of the Amendment,

> sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Because the home is the focus of the beliefs, thoughts, emotions and sensations of our people, privacy within it is entitled to and has always recieved the utmost protection under the Fourth Amendment. *United States* v. *Martinez-Fuerte*, 428 U.S. at 561; see also, *Berger* v. *New York*, 388 U.S. 41, 53 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967).

In light of the paramount Fourth Amendment interests in the privacy of the home, the statement of the majority below that it could "perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence" (A. 76) is indefensible. The distinction is obvious as this Court observed even when the seizure of property, rather than of people, was in question: "it is one thing to seize without a warrant property resting in an open area. . . , and it is quite another thing to effect a warrantless seizure of property. . . situated on private premises to which access is not otherwise available for the seizing

officer." *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977); see also, *Coolidge* v. *New Hampshire*, 403 U.S. at 513-514 (White, J., concurring and dissenting).

The majority below concluded, however, that presence in the home did not confer upon a person the same rights against seizure which attach to his property, because an entry of the home to arrest was a "minimal intrusion" into the privacy of the home and because it was a lesser intrusion than an entry to "search" (A. 75, 76). The court's conclusion must fail because its premises are faulty.

The majority erred in assuming that an entry to arrest was a "minimal intrusion on the elements of privacy of the home" (A. 76). First, the entry itself subjects all occupants, not just the suspect, to the presence of intruders. For example, the intrusion in *Riddick* affected not only Riddick himself but also his three-year old son. Moreover, because the manner in which home arrests are made is designed to ensure police safety rather than individual privacy, the entry will often be a disturbing and disruptive event. See, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stan.L.Rev. 995, 997 (1971). Consider, for example, the procedure recommended by one recognized [see, *Miranda* v. *Arizona*, 384 U.S. 436, 449 n.9 (1966)] law enforcement authority:

> the agents should move in quickly, force the subject back into the room and separate inside of the room, avoiding the danger of cross-fire. In the event that the door is not unlocked, a pass key should be quietly inserted and turned without

> standing in front of the door. One agent should kick the door aside sharply to determine if anyone is standing behind it. Again, the agents should move in quickly and spread out against the near wall.

C. O'Hara, FUNDAMENTALS OF CRIMINAL INVESTIGATION 839 (3d ed. 1973).

Second, beyond the entry and presence of police in the home, the privacy of its residents is further violated by police scrutiny of all items in open view. Many of these, such as private papers and documents, mementos and attire are extremely personal and are left in the open only because of the expectation of privacy a person has in his own home. Absent consent, these objects would not ordinarily be subject to the examination of others. See, e.g., *United States* v. *Reed*, 572 F.2d 412, 415-416 (2d Cir. 1978); *Commonwealth* v. *Forde*, 367 Mass. 798, 810, 329 N.E.2d 717, 725 (1975) (Hennessey, J., concurring) ("the crux of the unconstitutional invasion. . . lay in the roving eye of the arresting officer who [entered] the premises."); Comment, *Watson and Ramey: The Balance of Interests in Non-Exigent Felony Arrests*, 38 San Diego L. Rev. 838, 857 n.137 (1976). The extent to which "plain view" alone invades the privacy of the home is thus not minimal.

Furthermore, when police arrest in the home, they do not simply seize and remove the suspect. Rather, upon entry, they often "fan out" or conduct a "protective sweep" sending officers throughout the house. This practice has been approved by many courts

as necessary to their safety.[17] The officers in these two cases followed just such a procedure. In *Payton*, the police, upon gaining entry, immediately spread out through the entire apartment. In *Riddick*, only two of the four officers actually arrested him in the bedroom while the others were apparently elsewhere in the house. Such intrusions can hardly be called "minimal."

Third, entry into a home for the purpose of arrest inevitably entails more than a "plain view" of the premises and its contents, for the arrest itself is invariably accompanied by an incidental search. Although limited in scope, this search may be relatively intensive near the body of the suspect. Depending on where the suspect may be in the premises, the search may extend to its most private areas such as the bedroom or bathroom. When appellant Riddick was arrested, for example, the police searched under his pillow and beneath his bed as well as in the drawers of his dresser. Few areas are more private than these, and the intrusion into them, although justified by the circumstances, cannot be dismissed as insignificant.

Finally, many arrests entail an even greater intrusion than this. Where, for example, upon arrival of the police, the suspect has the misfortune to be in a remote corner of his home, they may conduct a search of any areas of the house large enough to secrete a person,

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[17] See, e.g., *United States v. Guidry*, 534 F.2d 1220, 1223 (6th Cir. 1976); *United States v. Cepulonis*, 530 F.2d 238, 244 (1st Cir.), *cert. denied*, 426 U.S. 908 (1976); *United States v. Sellars*, 520 F.2d 1281 (4th Cir. 1975); *United States v. Looney*, 481 F.2d 31 (5th Cir.), *cert. denied*, 414 U.S. 1070 (1973); *United States v. Briddle*, 436 F.2d 4 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); Note, *Watson and Santana: Death Knell for Arrest Warrants?*, 28 Syracuse L. Rev. 787, 803-04 (1977).

until they discover him. See, *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967). Where the suspect is not home at all, the entire house, save for small drawers, cupboards, and the like, may be searched. In Payton's case, for example, the officers seeking to arrest him searched under the bed and in closets throughout his apartment. Where an intrusion of this nature occurs, there is no basis for the majority's view that in an entry to arrest "there is no accompanying prying into the area of expected privacy attending [the suspect's] possessions and affairs" (A. 76). The very entry of the home is itself a "prying" into the most private area of all, and the ensuing search for the suspect may invade the privacy of all "possessions and affairs" implicated in it.

As a theoretical matter, the majority's distinction between a search and an arrest is unsound because it disregards the nature of the violation of a householder's privacy expectations caused by an arrest entry. The Fourth Amendment's reach is not contingent upon whether some intrusion traditionally called a "search" has occurred but upon whether there has been an intrusion, of whatever kind, into an area in which there is a legitimate expectation of privacy. It is not only the "rummaging of drawers" against which the Amendment speaks, but against "the invasion of [a person's] right to personal security, personal liberty and private property." *Boyd* v. *United States*, 116 U.S. at 630.[18]

[18]Thus, while the use of force or violence in entry may create "circumstances of aggravation," they are not the crux of the Fourth Amendment violation. *Boyd v. United States*, 116 U.S. at 630. Even a peaceful entry, if not consented to, invades the home's privacy and is subject to the warrant requirement. *United States v. Reed*, 572 F.2d 412, 423 n.9 (2d Cir. 1978); *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958).

The label "search" is thus not entitled to the talismanic significance given it by the Court of Appeals. Just as the common law concept of "trespass" failed to encompass fully the privacy expectations within the home [compare, *Olmstead* v. *United States*, 277 U.S. 438, with *Katz* v. *United States*, 389 U.S. 347 (1967)], the Court of Appeals' search/arrest dichotomy denigrates unjustifiably the true interests at stake.

The Court of Appeals' erroneous analysis is underscored, in concrete terms, by the fact that the privacy interests affected when arrests are made within the home are considerably greater than those which this Court has often protected by imposition of the warrant requirement when a search has been involved. For example, the Court has held that expectations of privacy in a mere footlocker [*United States* v. *Chadwick*, 433 U.S. 1 (1977)], in packages sent through the mail [*Ex parte Jackson*, 96 U.S. 727 (1876)], in the rubble of a burned-out business establishment [*Michigan* v. *Tyler*, 436 U.S. 499 (1978)], and in business premises open to numerous employees [*Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978)] command the safeguards of the Warrant Clause.[19] While the privacy interest in each of these instances is significant, it is overshadowed by that which people enjoy in the privacy of their own homes. It follows, therefore, that if these lesser interests are protected through interposition of a neutral magistrate, the greater should be as

[19]In *Camara v. Municipal Court*, 387 U.S. 523 (1967), where the home was involved but entry was merely to view its contents and structure to determine compliance with building code requirements, a warrant was also required.

well.[20]

The Fourth Amendment interest in the "security of. . . persons" adds further justification for the application of the warrant requirement in these cases. In addition to the intrusion on the home, these cases also involve the "serious personal intrusion" of arrest, an intrusion which alone may be greater than the invasion of privacy involved in a search. *United States* v. *Watson*, 423 U.S. at 428 (Powell, J., concurring). *Chimel* v. *California*, 395 U.S. 752, 776 (1969) (White, J., dissenting). *United States* v. *Watson, supra,* did not hold that the invasion involved in an arrest was insubstantial, but found that warrantless public arrests had been universally accepted for so long that they

[20]The majority also erred in concluding that in terms of its intrusiveness an arrest in the home was indistinguishable from one made in public and that, indeed it might even be less so because there was not the "added exposure" of an arrest in public (A. 76). The American Law Institute employed the same reasoning in recommending that no warrant should be required. ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to Section 120.6 at 307 (1975). There is no valid basis for these assumptions. Whether the offensiveness of a street arrest is greater is largely a matter of individual circumstance and subjective reaction. Many street arrests occur out of the view of others or in situations where little or no attention is paid. On the other hand, arrests within the home frequently cause great humiliation because of the presence of family, friends or neighbors. Indeed, Riddick's arrest in the presence of his three-year-old son may have caused him great embarrassment and terrified the boy as well. Had Riddick been arrested in public he would have been spared the embarrassment of being placed under arrest while naked in bed. More fundamentally, however, the embarrassment quotient in public *vis-a-vis* home arrests is irrelevant to the issue of whether a warrant is required for the latter. Wherever the arrest occurs, there is present the intrusion caused by loss of liberty. But when the arrest is made in the home, there is the additional intrusion on privacy and it is that intrusion which triggers the warrant requirement.

must be deemed reasonable. 423 U.S. at 423-24. In that case, the logic by which warrants would be required for all invasions of such magnitude had to defer to history. *Id.* at 429 (Powell, J., concurring). As we show below, however, there is no historical basis for exempting the entry of the home to arrest from the warrant requirement. See *infra* pp. 40-55. In the absence of any such historical basis, the gross intrusion of a seizure of the person adds further reason for requiring warrants for arrests in the home. Indeed, it is "incongruous to pay homage to the considerable body of law that has developed to protect an individual's belongings from unreasonable search and seizure in his home, and at the same time assert that identical considerations do not operate to protect the individual himself in the same setting." *People* v. *Ramey*, 16 Cal. 3d 263, 275, 545 P.2d 1333, 1340. *cert. denied*, 429 U.S. 929 (1976).

II. The Warrant Requirement Is Essential to the Protection of the Privacy Interests at Stake When Arrests Are Made Within the Home.

At the "very heart of the Fourth Amendment" is the requirement that where practical a search and seizure should be justified by a magistrate's judgment that there is sufficient cause for the intrusion. *United States* v. *United States District Court*, 407 U.S. at 316. In the context of criminal investigation, it is this requirement which protects the individual's legitimate expectation of privacy against the "overzealous police officer." *South Dakota* v. *Opperman*, 428 U.S. at 383 (Powell, J., concurring). As a result, the Court has, in the case of

searches, consistently held that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Mincey* v. *Arizona*, 57 L.Ed.2d 290, 298-299 (1978); *Camara* v. *Municipal Court*, 387 U.S. at 528-29. Where, as in the cases at bar, even greater privacy interests are invaded than in many "searches," and where the warrant provides important protection against unfounded or excessive invasions, the warrant requirement should also apply.

The arrest warrant fulfills the same high function as the search warrant of placing in the hands of a "neutral and detached magistrate" the difficult determination of probable cause. *Gerstein* v. *Pugh*, 420 U.S. 103, 113 & n.12 (1975). Indeed, it was in a case of unlawful arrest that Lord Mansfield wrote "[i]t is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." *Leach* v. *Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765); see, *United States* v. *United States District Court*, 407 U.S. at 316. In arrest cases, of course, the officer has enormous discretion as to whether, whom, when and where to arrest,[21] a power

[21] Where the officer's discretion is limited, even in search cases, no warrant may be required. *United States v. Martinez-Fuerte*, 428 U.S. at 566; *South Dakota v. Opperman*, 428 U.S. at 383-84 (Powell, J., concurring). But in determining probable cause to arrest, the officer exercises wide-ranging discretion. He must take into account many facts in highly variable situations and reach a decision which even courts often find difficult. See, e.g., *Beck v. Ohio*, 379 U.S. 89 (1964); *Draper v. United States*, 358 U.S. 307 (1959). When such a decision is to be made, it is far better that it be made by someone whose judgment is not colored by the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. at 14.

subject to "not infrequent abuse." *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1962); see, e.g., *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966). Where there exists such discretion and the concomitant possibility of error or abuse, it is the magistrate, and not the potentially "overzealous police officer" who should judge whether grounds exist for the entry of a home. See, *South Dakota* v. *Opperman*, 428 U.S. at 383 (Powell, J., concurring); *Johnson* v. *United States*, 333 U.S. at 14. Even in arrest cases, therefore, the warrant provides the "[m]aximum protection of individual rights" (*Gerstein* v. *Pugh*, 420 U.S. at 113), and where a home is to be entered solely upon a discretionary judgment that there is probable cause to arrest one of its occupants, that judgment should be made by a magistrate.

The warrant adds further protection to the citizen's rights by specifying the purpose of the intrusion and its lawful scope. *United States* v. *Chadwick*, 433 U.S. at 9. Officers who have obtained only an arrest warrant will recognize accordingly that they have autority solely to make the arrest and the strictly limited search incident to it. Too often, however, when the police enter a home without a warrant they fail to distinguish between their authority to search and to arrest, and engage in a general search where only a limited one is authorized. See, e.g., *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. at 389. In appellant Payton's case, for example, the police, despite their knowledge, gained shortly after entry, that he was not at home, conducted an extensive search of the entire apartment, opening closets, dresser drawers and cupboards. As Judge Cooke observed in dissent, "[h]ad the police in fact obtained a warrant, limiting the scope of their activities

after entry, their patently illegal actions in conducting a full-blown search of the premises might have been avoided" (A. 92-93).

Another purpose of the warrant requirement applicable to arrests in homes is that of preventing hindsight from coloring later evaluations of the entry's reasonableness. *United States* v. *Martinez-Fuerte*, 428 U.S. at 565; *South Dakota* v. *Opperman*, 428 U.S. at 383 (Powell, J., concurring). That which fortuitously turns up on entry may well make police actions look, in retrospect, more reasonable than they were when taken. Moreover, there is often the question, when the police enter a home, of whether they intended to arrest or to search. When an illegal warrantless search is attempted, justification may later be sought for it on the grounds that a warrantless entry to arrest would have been permissible. See, *Jones* v. *United States*, 357 U.S. 493, 500 (1957). Where warrants are required for entries, however, the officer's authority will be clear and will not be subject to amendment by hindsight.[22]

[22] Police have also been known frequently to engage in the practice of "timed arrests," an arrest which has been scheduled for a time at which they hope to discover not only the suspect but evidence of the crime. Thus it has been observed that:

> In the case of an arrest in the suspect's home, a timed arrest could take a number of possible forms. Police might, for example, refrain from arresting a suspect until the suspect has entered his home in the hope that, upon entry into the home to arrest the suspect, they will discover evidence in plain view or during a search incident to arrest. Police might also refrain from arresting a suspect who is in his home until they believe that evidence for which there is no probable cause to search is in fact present in the home. Timed arrests amount to an avoidance of the search warrant requirement, and base the high level of intrusiveness inherent in a police invasion of the home on the slender reed of a police officer's determination that probable cause to arrest exists. Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. Ill. Law Forum 655, 658 n.21.

Finally, the warrant is crucial because it offers protection against otherwise irreparable violations of rights by the police. An individual who is wrongfully arrested in his home must receive thereafter a judicial determination of the grounds for holding him before his detention may be prolonged. *Gerstein* v. *Pugh*, 420 U.S. 103. Although that determination may result in his release, it will come too late to repair the injury done him. See, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. at 389. And his subsequent release does nothing to repair the injury to innocent family or friends in his home whose privacy was also invaded. Only the warrant requirement can adequately protect against such injury, for only it prevents such invasions before they occur and thus protects the innocent as well as the guilty from violations of their rights. *Chimel* v. *California*, 395 U.S. at 766 n.12. Because of the supreme protection provided by the warrant for the security of houses and persons, it is required by the Fourth Amendment prior to any invasion of the home to arrest, absent exigent circumstances.

III. The Warrant Requirement for Arrests Within the Home Imposes No Undue Burden on Legitimate Law Enforcement Concerns.

The fundamental importance of the privacy interest within the home is not outweighed by law enforcement interests in dispensing with a warrant for home arrests. In the limited context of arrests within the home, the warrant requirement imposes no undue burden upon the police. First, in no way does it prohibit them from making arrests in a residence if they deem it advisable; they may always do so under a warrant or without one

when immediate action is necessary. Second, where no exigent circumstances exist, such as the possibility of escape, the destruction of evidence, or a life-endangering emergency, no legitimate law enforcement interest is served by dispensing with a warrant. Whatever "slight delay necessary to prepare papers and present the evidence to a magistrate" may occur is not by itself "enough to by-pass the constitutional requirement." *Johnson* v. *United States*, 333 U.S. at 15.

Indeed, in large numbers of routine cases of arrest in the home, the government has no interest in proceeding to make the arrest immediately, instead of expending the short time necessary to obtain a warrant.[23] For example, once a substantial period of time has elapsed after the crime the need for immediate entry of the home to arrest has evaporated. In such a case, by the time the police seek a suspect at home, they will have determined both his identity and the location of his residence. The danger present in "hot pursuit" situations that the suspect may never even be identified does not exist. Moreover, the very act of the police in seeking him out at his home demonstrates their belief

[23]In fact, the police make a substantial number of arrests long after a crime has been committed. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the Quagmire*, 8 Crim. L. Bull. 9, 22-23 (1972). Conversely, a significant number of arrests are made within a very short time after a crime has been committed. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology 96 (1967). These arrests often involve exigent circumstances and thus would be excepted from the warrant requirement. See, Note, *Warrantless Entry to Arrest: A Practical Solution to the Fourth Amendment Problem*, *supra*, n.22 at 666 n.71. In the latter cases the arrest is frequently made in public, at the scene of the crime, and the warrant requirement does not even apply.

that he has neither fled the jurisdiction nor gone into hiding. Thus, where the crime was committed some time before and the suspect is still in his home, the danger of escape or other harm dissipates and there is nothing to be said for dispensing with a warrant.

Furthermore, that a routine arrest is to be made in the home in itself usually means that the police have ample opportunity to obtain a warrant. Except in hot pursuit cases, or in other cases of sudden exigency, the decision to arrest in the home is deliberate and is made some time in advance of the actual arrest. The police must, at the least, proceed from the station-house to the suspect's house in order to make it; in the routine case, there is no reason why they should not also take the additional time to obtain authorization for their actions. Also, the procedure recommended for arrests in a building, and used in both cases at bar, is that they be made by a number of police officers. C. O'Hara, Fundamentals of Criminal Investigation, *supra*, at 839. During the time required to gather reinforcements and proceed to the site, one of the officers could easily obtain the warrant.

In both cases herein, obtaining a warrant would have been no hindrance whatever to the police. Both crimes had been completed days or months before and still the police believed appellants were in their homes. Additionally, the police themselves failed to attempt an arrest at the first opportunity. This deliberate delay on their part strongly suggests that the slight additional delay to obtain a warrant would not have been at all burdensome. In such cases as these, which are by no means atypical, the claim that a warrant requirement is

an onerous burden upon the police is unfounded.[24]

In *United States* v. *Watson*, however, Mr. Justice Powell suggested that imposition of a warrant requirement for arrests might pose a serious dilemma for the police. 423 U.S. at 431-432. If they sought a warrant immediately upon obtaining probable cause, that warrant might go stale before execution. If they delayed obtaining a warrant, and a sudden emergency required an immediate arrest, a court might hold their failure to get the warrant inexcusable because they had the opportunity to do so. The burden which results from this dilemma is negligible. First, as Mr. Justice Powell himself noted, arrest warrants will rarely go stale. 423 U.S. at 432 n.5. This is so because probable cause to arrest is predicated on suspicion of an ineradicable crime rather than on the momentary presence of evidence or contraband at a particular location. Accordingly, an arrest warrant tends to remain valid indefinitely. Thus, in Riddick's case,

[24]Such routine cases of delayed arrest in the home are precisely the types of cases in which the warrant furnishes the greatest protection against unreasonable entries. In such cases, the police often believe they have cause to arrest based on information obtained some time after commission of the crime; the belatedly obtained information may well be suspect, and examination by the neutral eye of the magistrate is most necessary to protect individual rights against overzealous action. Thus, even the United States Government has suggested that:

> because entries to make arrests for crimes long completed are more likely to be mistaken, and are more open to abuse, than are entries to arrest individuals for freshly committed or ongoing crimes, the Court might hold that warrants ordinarily should be obtained to make arrests for *crimes completed more than a few hours prior to the arrest.*

Brief for the United States in *United States v. Santana*, 427 U.S. 38 (1976) at 47 (emphasis ours).

where the police had probable cause for nine months, there would not have been a staleness problem. See, e.g., *Wilson* v. *United States*, 325 F.2d 224 (D.C. Cir. 1963) (five month delay in execution of arrest warrant sustained). Moreover, if police delay making an arrest or search and the sudden need to do so arises, the exigency will excuse the failure to get the warrant. See, *United States* v. *Lisznyai*, 470 F.2d 707, 710 (2d Cir. 1972) *cert. denied*, 410 U.S. 987 (1973). Therefore, the burden, if any, posed by this dilemma is, in the context of the privacy interests involved here, constitutionally insignificant.[25]

Lastly, the view that obtaining arrest warrants for arrests in private dwellings is an intolerable burden is belied by contrary views of authorities on law enforcement. The Federal Bureau of Investigation, for one, makes a practice of obtaining warrants for all arrests if time permits. Brief for the United States in *United States v. Watson*, 423 U.S. 411 (1976) at 26 n.15. In

[25]In their brief to the Court of Appeals in the *Payton* case, the prosecution argued that a mandatory warrant requirement would also be burdensome because "[o]nce probable cause develops, the officer's judgment may be that further steps in the investigation should immediately be taken concerning the crime, the location of the suspect, or how to effect his arrest," and that "[g]iven the practical limitations on law enforcement resources assigned to the case, such steps may not be possible if the officer must take time out from the investigation to obtain an arrest warrant." (Brief, pp. 91-92). This argument sets up a false predicament, however, for the hypothetical officer need not choose between obtaining the warrant and investigating further; he may do both by waiting to get the warrant until after his investigation is complete. In choosing to continue his investigation, rather than arresting immediately, the officer apparently perceives no risk of escape, and the slight additional delay in getting the warrant imposes no burden.

addition, a leading text on criminal investigation counsels that "[i]f it is necessary to effect an arrest in a hotel or apartment house, a warrant should be obtained if time permits." C. O'Hara, FUNDAMENTALS OF CRIMINAL INVESTIGATION, *supra*, at 839.

As these authorities apparently agree, there is no undue hindrance to law enforcement involved in obtaining warrants for home arrests. Whatever extra efforts the police must make to get a warrant is an insignificant burden in comparison with the importance of the privacy the warrant protects. Thus, the warrant requirement is fully consistent with "the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 57 L.Ed.2d at 301.

IV. The History of the Common Law of Arrest Requires No Different Result.

As we have shown, traditional Fourth Amendment analysis, which balances the right to privacy against the needs of law enforcement, compels the conclusion that warrants are required for the entry of a home to arrest. In *United States v. Watson*, however, the Court considered a factor outside the traditional analysis—the history of the common law of arrest—in determining that warrants were not required for arrests in public. The nature of the common law with respect to warrantless arrests within private dwellings is so markedly different from that which governed public arrests that it cannot serve as a meaningful guide to

resolution of the issue in this case.

The common law concerning warrantless public arrests rehearsed in *Watson* was remarkable for its clarity, its abundance and its continuity. The rule that felony arrests in public could be made without warrant had been formulated in unequivocal fashion from the seventeenth century. Since that time, numerous cases in both England and America had reiterated the rule, and there had been not a single case, until *Watson* itself, in which a court had required a warrant for a public felony arrest. Perhaps most significantly, the rule was well established at the adoption of the Fourth Amendment and nothing suggested that the Framers intended to abandon it. *United States v. Watson*, 423 U.S. at 429-430 (Powell, J., concurring). Given the universal acceptance of the rule, when this nation was founded and ever since, the conclusion was compelling to a majority of the Court that warrantless public arrests were reasonable and that the Framers of the Fourth Amendment had implicitly approved them.

As we demonstrate below, however, the state of the common law with respect to arrests in the home was altogether different and does not permit the same conclusions to be drawn. As the Court has previously recognized, there was never on this question the universal agreement which existed concerning the propriety of warrantless arrests in public. *Miller v. United States*, 357 U.S. 301, 307-308 (1958). Indeed, despite considerable disagreement, a strong current of authority throughout the eighteenth and nineteenth centuries required warrants for non-exigent arrests in a suspect's home. The recent authority considering the question in light of Fourth Amendment principles has

overwhelmingly required such warrants. Under these circumstances, legal history provides no guide to the proper construction of the Fourth Amendment.

A. The Common Law of Entries to Arrest Was Wholly Unsettled at the Framing of the Constitution.

In this case, unlike *Watson*, reliance on the common law rule would be especially misplaced, for the rule regarding entries to arrest was in substantial dispute at the time of the adoption of the Fourth Amendment. In *Watson*, the rule permitting warrantless arrests in public was well accepted by the end of the eighteenth century and had been adopted implicitly by the Second Congress. This circumstance permitted the inference that the "constitutional provision was intended to restrict entirely different practices." 423 U.S. at 430 (Powell, J., concurring). Here, however, the uncertain status of the law concerning entries of a home to arrest allows no conclusion to be drawn concerning the intent of the Framers regarding them.

Insofar as the term "common law" denotes a continuous series of judge-made rulings on an issue, there was no common law of arrest entries. Prior to the adoption of the Constitution, the only English cases even remotely addressing the subject dealt with when doors might be "broken" in the execution of civil process, a question separate from that of entry in a

criminal case.[26] See, Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 501 (1964) ("The extent to which privilege of the house extended to criminal rather than civil cases seems never to have been considered squarely."). The *dicta* in those cases do not clearly establish whether or not a warrant was necessary to break doors to make a felony arrest.

At the adoption of the Fourth Amendment, the most recent case on the subject was *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603), and it was then almost two

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[26]The common law was concerned with when a "breaking" might be committed to effect an arrest, but the word "breaking" was a term of art which did not denote the actual physical destruction of property or forcible entry. At its broadest, the term included virtually any trespassory entry. See, 2 E. East, PLEAS OF THE CROWN 485 (1803) ("every entry by a trespasser [is] a breaking in law"); M. Dalton, THE COUNTRY JUSTICE 299 (1697) (where persons come armed "to an House that is open . . . and shall there enter peaceably without any disturbance; yet this is a Forcible Entry, for it shall be intended, that they would have used force, if they had been resisted"). Even in the somewhat narrower use of the term in the law of burglary, no force was required to constitute a breaking. For example, the entry made by opening fully a partially opened door was a breaking. R. Perkins, CRIMINAL LAW 193 (2d Ed. 1969). Indeed, a constructive breaking could occur where an occupant of the house opened a door to intruders and they entered peaceably. See, e.g., *Commonwealth v. Lowrey*, 158 Mass. 18, 32 N.E. 940 (1893) (Holmes, J.) (if an innocent hand opens the door to an intruder it is a breaking); *State v. Mordecai*, 68 N.C. 207 (1873); (peaceable entry); *Johnston v. Commonwealth*, 85 Pa. 54, 64 (1877); *Parke v. Evans*, Hob. 62,80 Eng. Rep. 211 (K.B. 1615). Thus, in by a young boy, their abrupt entry without seeking or obtaining consent constituted a common law "breaking."

centuries old.[27] In that case, the court had held that the defendant was entitled to refuse entry to his home to officers executing a writ of attachment upon property, since the officers had not made known that they came with civil process and requested entry. 77 Eng. Rep. at 199. In the course of its discussion, the court considered, in *dicta*, the question of when doors might be broken "either to arrest . . . or to do *other* execution of the K[ing's] process." 77 Eng. Rep. at 195 (emphasis ours). The court concluded that on suspicion of felony,[28] an officer

[27]The only other case on the subject was decided three centuries before the American revolution and is found in the 13th Yearbook of Edward IV (1461-1483), at folio 9. It too contains only *dicta* concerning arrests or suspicion of felony, for it concerned only when doors might be broken to serve civil process. *Miller v. United States*, 357 U.S. 301, 307 (1958). The court's discussion says that where there is suspicion of felony, doors may be broken to arrest because the writ is a *non omittas*; the obvious presumption is that there will be a writ, or warrant, of some kind. *Accarino v. United States*, 179 F.2d 456, 460 (D.C. Cir. 1949).

[28]We deal here only with the common law rules applicable to arrests made "on suspicion of felony," the ancient equivalent of our probable cause. The common law distinguished between suspicion of felony and actual "knowledge" of felony, the difference consisting of whether the constable "saw the felony committed, or hath it only by complaint and information." 2 M. Hale, THE HISTORY OF THE PLEAS OF THE CROWN 91 (1736). Everyone agreed that where the constable actually had witnessed the felony, that is "[w]here one known to have committed a Treason or Felony . . . is pursued," doors could be broken without warrant. 2 W. Hawkins, PLEAS OF THE CROWN 86 (1716). All the old language to the effect that doors could be broken open on "knowledge" or "for felony," simply states the well accepted doctrine that warrantless entries may be made in "hot pursuit." *Warden v. Hayden*, 387 U.S. 347 (1967). The only question of interest here is what the common law authorities thought of arrests which were not made in hot pursuit, that is, of arrests on "suspicion," rather than knowledge, of felony. On this question there was no agreement.

> may break the house to apprehend the felon, and that for two reasons:
>
> 1. For the commonwealth, for it is for the commonwealth to apprehend felons.
>
> 2. In every felony the King has interest, and where the King has interest the writ is *non omittas propter aliquam libertatem* [to be executed notwithstanding any liberty]; and so the liberty or privilege of a house doth not hold against the King.

77 Eng. Rep. at 197. Aside from its lack of relevance to the Fourth Amendment,[29] the most striking facet of the case is that it does not say whether or not a warrant was required for the breaking. Indeed, both the references to "other . . . process" and to "the writ" in connection with the breaking to arrest imply that some warrant or other judicial authorization was contemplated.

The complete absence of any case law following *Semayne's Case* led to understandable confusion among the commentators about what the actual rule was. One strong current of authority contended that judicial authorization was necessary for the entry of a home

[29]The reasoning of *Semayne's Case* is appropriate only to the determination of the relationship between the King and a feudal lord and not between the modern state and the citizen which is governed by the Fourth Amendment. The writ referred to in the text, *non omittas propter aliquam libertatem*, was a writ employed by the medieval Kings to restrain the independence of those lords who held private rights of doing justice in their own domains, called "liberties." When the lord's steward refused to execute the King's writ within the liberty, the King's court would issue the *non omittas* writ directing the sheriff to execute it himself, notwithstanding the existence of the liberty. H. Cam, LIBERTIES AND COMMUNITIES IN MEDIEVAL ENGLAND 191-92 (1944). Thus, the King established himself as the primary source of justice in a judicial system fragmented by feudal rights. In this light, *Semayne's Case* appears correctly as an expression of the growth of the power of the modern state; the Fourth Amendment stands, however, as a recognition that that very power had grown too great and must be limited.

"on suspicion of felony," absent the ancient equivalent of exigent circumstances. Lord Coke was an early proponent of this view. In his opinion, entry of a home to arrest could be made only by a warrant (*capias*) issued after an indictment, or on hue and cry, that is in "hot pursuit," without a warrant. E. Coke, 4 INST. *177. Otherwise, a man's home was his castle and could not be entered even upon a warrant issued by a justice of the peace. *Id.* Thus, so sacred was the home for Coke that in the absence of exigency he required a finding of probable cause to be made by a grand jury, rather than a mere magistrate.

A number of later authorities continued to follow Coke's view or some modified version of it. Hawkins, for example, after noting that doors could be broken where one "known" to have committed a felony was "pursued," added, "[b]ut where one lies under a probable suspicion only, and is not indicted, it seems the better Opinion at this Day, That no one can justify the breaking open Doors in Order to apprehend him." 2 W. Hawkins, PLEAS OF THE CROWN 86-87 (1716). Similarly, at the outbreak of the American revolution Justice Foster, in the second edition of his treatise, flatly stated, "[b]ut bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity [breaking doors], though a felony hath been actually committed; unless the officer cometh armed with a warrant from a magistrate grounded on such suspicion." M. Foster, CROWN LAW 321 (2d ed. 1776). Finally East, writing at the end of the century, held the same view:

> But though a felony have been actually committed, yet a bare suspicion of guilt against the party will not warrant [breaking doors], unless the officer be armed with a magistrate's warrant grounded on such suspicion. It will at least be at the peril of proving that the party so taken on suspicion was guilty.[30]

1 E. East, PLEAS OF THE CROWN 322 (1803). East emphasized the necessity for a warrant in discussing the principle that the home could be entered, without a warrant, to rearrest a suspect. After explaining the principle, he added: "If it be not, however, *upon fresh pursuit*, it seems that the officer should have a warrant from a magistrate." *Id.* at 324 (emphasis ours). Thus, at the end of the eighteenth century, substantial authority held that a warrant was necessary to "break doors" to arrest, absent some exigency.[31]

There was, of course, contrary authority. Hale, for example, supposed a general authority of the King's officers to enter homes without warrants to arrest on suspicion of felony. 1 M. Hale, THE HISTORY OF THE PLEAS OF THE CROWN 588 (1736). Even Hale, however, recognized that the better practice was to obtain the warrant when ever possible: "Yet to avoid question in these cases, it is best to obtain the warrant of a justice, if

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[30]The significance of this last sentence will be dealt with at pages 54, 55, *infra*.

[31]The drafters of the ALI Model Code believed this to be the prevailing common law view: "[a]t common law officers were authorized to break into a house to effect an arrest *only* if the arrest was under a warrant, or according to some but not all authorities without a warrant on suspicion of felony." ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to §120.6, at 308 (1975) (emphasis ours).

the time and necessity will permit." *Id.* at 589.[32] Moreover, Hale permitted such extreme measures to be taken only if a felony had *actually* been committed: "But there must be a felony in fact done, and the constable must be ascertained of that, and aver it in his plea, and it is issuable [that is, triable as an issue in an action for false imprisonment or trespass]." 2 M. Hale, *supra*, at 92; see, also, 1 M. Hale, *supra*, at 588. Hale's authorization of warrantless breakings to arrest is thus heavily qualified by his admonition that warrants should be gotten whenever possible and by his imposition of civil liability on officers who made good faith arrests in the mistaken belief that a felony had been committed.

The only remaining authority clearly permitting warrantless breakings is the influential Blackstone:

> And, in case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, [the constable] may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken. . . .

4 W. Blackstone, COMMENTARIES *292. Blackstone's statement of the proposition is remarkable only for the absence of his usual thoroughness in treating the varying opinion on the subject; his only citation is to Hale. In adopting Hale's view without comment, however, Blackstone also took the position that warrantless entries to arrest were permissible only "in

[32]Apparently because of this, one later commentator assumed that Hale permitted entries only upon a warrant. See, R. Burn, THE JUSTICE OF THE PEACE AND PARISH OFFICER 107 (16th ed. 1788).

case of felony actually committed." *Id.* Thus, according to both Blackstone and Hale, an officer could insulate himself from liability for a mistaken arrest only by obtaining a warrant.[33]

By the end of the eighteenth century, therefore, the common law was in substantial disarray over the question of breaking doors to arrest on suspicion. There were simply no cases on the subject. Among the commentators there was, as we have shown, substantial disagreement. See also, Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California, supra*, 112 U. Pa. L. Rev. at 502 n.30. The most that can be said is that many authorities did require warrants, and that those who did not permitted warrantless breakings only in limited circumstances.

Under these circumstances, it cannot be inferred that the Framers of the Fourth Amendment intended either to approve or disapprove warrantless entries of the home to arrest. Compare *United States v. Watson*, 423 U.S. at 429-430 (Powell, J., concurring); see, Note, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 Dick. L. Rev. 167, 182 (1977). The Framers never specifically addressed the question, and there is no way to know whether they would have adopted Hale's view over Foster's, had they given it thought. All that we really know is that the Framers "intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth," (*United States v.*

[33]Dalton is sometimes cited as being in accord with this view, but in fact he does not say whether a warrant is required for an arrest on suspicion of felony. M. Dalton, THE COUNTRY JUSTICE 307 (1697).

Chadwick, 433 U.S. at 9), and that the value they most wished to safeguard was the privacy of the home. *Id.* at 8; see *United States v. United States District Court*, 407 U.S. at 313.

B. The Common Law Authorities in the Nineteenth Century Remained Divided on the Warrant Requirement.

Examination of the American common law authorities of the nineteenth century demonstrates that the rules concerning breakings to arrest did not become settled during that period. Many commentators continued to be of the opinion that warrants were required before a house could be broken on suspicion of felony. Indeed, Russell, after stating that suspicion would not authorize a breaking "unless the officer comes armed with a warrant from a magistrate" goes on to say that "a different doctrine appears to have *formerly* prevailed upon this point; by which it was held, that if there were a charge of felony laid before the constable and reasonable ground of suspicion, such constable might break open CRIMES AND MISDEMEANORS 628-29 (5th Am. ed. 1845) (emphasis ours). In Russell's opinion, the earlier views of Hale and Blackstone had been superseded.

Likewise, numerous other authorities believed that warrants were necessary to break a house on suspicion. Some stated the rule as an inescapable requirement. See, F. Heard, A TREATISE ADAPTED TO THE LAW AND PRACTICE OF THE SUPERIOR COURTS . . . IN CRIMINAL CASES 148 (1879). Others, adopting East's formulation, stated that the warrant was generally required but that an officer might possibly escape civil liability for omitting it by proving that the arrestee was actually

guilty of a felony:

> For where a person lies under probable suspicion only, and is not indicted, it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him cannot be justified: or must at least be considered as done at the peril of proving that the party, so apprehended on suspicion, is guilty.

1 W. Russell, *supra* at 629; *accord*, 2 O. Barbour, A TREATISE ON THE CRIMINAL LAW AND CRIMINAL COURTS OF THE STATE OF NEW YORK 547 (3d ed. 1883) (adding, "it will be prudent to obtain the warrant of the magistrate. . . under which the officer will be justified in thus proceeding"); 1 J. Colby, A PRACTICAL TREATISE ON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK 73 (1868); A. Tiffany, A TREATISE ON THE CRIMINAL LAW OF THE STATE OF MICHIGAN 97 (5th ed. 1900). The cautious "at least" of the commentators correctly suggests that it was in doubt whether an officer could justify his actions by showing the suspect's guilt or whether he was absolutely liable whenever he made a warrantless breaking on suspicion.

Again, other authorities would have imposed no warrant requirement, although they conceded the actual state of the law was in doubt. Chitty catalogued the varying opinions before deciding that a warrant was not necessary for an officer acting in good faith. 1 J. Chitty, CRIMINAL LAW 53 (3d Am. ed. 1836).[34]

[34]Even Chitty is cautious about eliminating the warrant, however, stating that "the breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." 1 J. Chitty, CRIMINAL LAW 53 (3d Am. ed. 1836).

Bishop also notes the conflict, stating as a reason for it that "the adjudications are few, and much of the doctrine on this subject in our books is drawn from the old *dicta*." 1 J. Bishop, CRIMINAL PROCEDURE 109 n.6 (3d ed. 1880).

Although Bishop argues that warrants should not be necessary, he is among the first to give reasons for his view, and those reasons demonstrate why the views of common law authorities are not an adequate guide to construction of the Fourth Amendment. The first ground given for dispensing with the warrant for arrests in the home is that such arrests are "in behalf of the State." *Id.* This argument, obviously a holdover from the notion that no liberty was a sanctuary against the King's writ, conflicts with the very notion that the Fourth Amendment is a restraint on the State's ability to intrude on a citizen's privacy, even when the State acts in its own "behalf." Were Bishop's reasoning to be accepted, then any search for evidence of crime could be conducted without a warrant too, for such proceedings are also in the State's interest.

Bishop's second reason for omitting the warrant is even stronger grounds for rejecting nineteenth century views in the matter. According to him, the warrant is not necessary because "the question of warrant or no warrant pertain[s] to form, not substance." *Id.* It would be hard to imagine any view more in conflict with modern Fourth Amendment law under which the warrant is the primary protection of Fourth Amendment rights. See, *Coolidge v. New Hampshire*, 403 U.S. at 481.

Finally, Bishop expressed concern that the requirement of a warrant might lead to escape. 1 J. Bishop,

supra at 196 n.6. But as we have noted, where there is genuine danger of escape, there are exigent circumstances and no warrant is required under the Fourth Amendment. *Johnson v. United States*, 333 U.S. at 15.

Whether or not Bishop's reasoning, so foreign to the twentieth century, was even accepted in the nineteenth is impossible to determine, for there is an almost complete absence of cases on the subject.[35] A few cases quote Hale or Blackstone approving warrantless entries but always in cases where the issue is not in question. See, *Shanley v. Wells*, 71 Ill. 78, 81-82 (1873) (quoting Blackstone, but holding a public arrest illegal, despite the existence of probable cause, since the suspect was in fact innocent); *McLennon v. Richardson*, 81 Mass. 74, 71 Am. Dec. 353 (1860) (holding warrantless entry of a shop to arrest for liquor and

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[35]Research has disclosed only one nineteenth century American case which actually deals with a warrantless entry to arrest for felony and in that case there were exigent circumstances. In *Randall's Case*, 5 City Hall Record 141 (N.Y. Court of Oyer and Terminer 1820), the court held that immediately after a "dangerous wounding" an officer could enter a home in order to prevent the suspect's escape. The court made a specific finding that "if the delay was to be incurred, of going for and coming with a warrant, the prisoner might have escaped and public justice have been evaded. . . ." *Id.* at 161. So heavily did the court rely on the exigent circumstances rationale that the case was later cited for the proposition that generally a warrant was necessary for an arrest in the home. 2 O. Barbour, A TREATISE ON THE CRIMINAL LAW AND CRIMINAL COURTS OF THE STATE OF NEW YORK 547 n.28 (3d ed. 1883).

The earliest nineteenth century English case to consider the question was *Davis v. Russell*, 5 Bing. 355, 130 Eng. Rep. 1098 (C.P. 1829) in which the court approved warrantless entries in *dictum*. In that case, the entry of the home was apparently by consent. *Id.* at 356, 365; 130 Eng. Rep. at 1098, 1102. The English authorities we have cited, such as Chitty and Russell, do not seem to have accepted this case as authoritative on when warrantless entries could be made. Indeed, the modern English rule still seems to be in doubt although tending to require a warrant. 1 W. Russell, ON CRIME 672 (J. Turner, ed., 12th ed. 1964).

gambling offenses illegal, because the offenses did not "disturb the public peace"). It is notable that in most cases concerning entries to arrest in this period, the officer actually did have a warrant.[36] This suggests that when a home was to be entered securing a warrant was the usual procedure.

The incentive for officers to obtain warrants is readily apparent. Although the law was confused, a large body of authority held that an officer who failed to get a warrant was absolutely liable in tort for trespass and false imprisonment if the suspect he arrested turned out to be innocent. This was the import of the formula that a warrantless breaking was not justifiable "or must at least be considered as done at the peril of proving that the party . . . is guilty." 1 W. Russell, CRIMES AND MISDEMEANORS, *supra*, at 629. This meant that if the officer mistakenly arrested an innocent person by entering his home, the officer would be strictly liable in money damages in a civil suit. That the officer had probable cause would be no defense. Cf., *Shanley v. Wells*, 71 Ill. 78, 81-82 (1873) (probable cause no defense for mistaken arrest, even in public); *Wakely v. Hart*, 6 Binn. 316, 319 (Pa. 1814).[37]

[36]See, e.g., *Kelsy v. Wright*, 1 Root 83 (Conn. 1783); *State v. Shaw*, 1 Root 134 (Conn. 1789); *Read v. Case*, 4 Conn. 166, 10 Am. Dec. 110 (1822); *Hawkins v. Commonwealth*, 53 Ky. 395, 61 Am. Dec. 147 (1854); *Barnard v. Bartlett*, 64 Mass. 501, 57 Am. Dec. 123 (1852); *Commonwealth v. Irwin*, 83 Mass. 587 (1861); *Commonwealth v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510 (1876); *State v. Smith*, 1 N.H. 346 (1818); *State v. Mooring*, 115 N.C. 709, 20 S.E. 182 (1894).

[37]In contrast with the plaintiffs in these early cases, a modern plaintiff asserting the same causes of action faces virtually insuperable difficulties in overcoming the various good faith and immunity defenses an officer may interpose. See, e.g., *Thompson v. Anderson*, 447 F. Supp. 584 (D. Md. 1977) (even though officer lacked probable cause to believe suspect was in home, he was not liable for entry and search because of unwritten standard operating procedures approved by the police department permitting such practice).

Thus the rule provided a powerful deterrent against making warrantless arrests in the home, for the officer would pay out of his pocket if he were honestly mistaken and this rule of law applied; if, however, he obtained an arrest warrant, he was insulated from liability for his errors.

As in the eighteenth century, the nineteenth century American common law had not settled whether a home could be entered without warrant to arrest for a felony. Some authorities held that no warrant was necessary, but their reasoning, that the warrant was a matter of "form, not substance," is severely at odds with the modern Fourth Amendment. The opposing rule, that warrants were necessary to insulate an officer from the consequences of his errors, was accepted by many authorities and provided a powerful incentive to officers to secure warrants lest they be held liable in civil actions. The obsolete common law rules of liability thus played a salutary role in insuring that officers sought a magistrate's approval before entering homes. The American common law of the nineteenth century thus provides no basis for exempting entries to arrest from the Warrant Clause of the Fourth Amendment, or to use Mr. Justice Powell's words, this is *not* a case where "logic . . . must defer to history and experience." *United States v. Watson*, 423 U.S. at 429.

C. Modern Courts, Examining Arrest Entries in Light of Fourth Amendment Interests, Have by a Substantial Majority Found Them Subject to the Warrant Requirement.

The first American case ever to approve the warrantless entry of a home to arrest absent exigent circumstances was decided in 1911. *Commonwealth v. Phelps*, 209 Mass. 396, 95 N.E. 868 (1911). While this case remained the

principal authority for some time, by mid-century the right of police to break down doors to arrest was severely questioned. See, *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949). Since then as courts have begun to take account of the governing Fourth Amendment principles, the balance of authority has shifted so that most federal circuits now require warrants for arrests in the home as do the vast majority of states to have considered the issue.

For a period of time at the end of the nineteenth and beginning of the twentieth century the bulk of authority was statutory, and many, but not all, states adopted provisions permitting warrantless arrests in homes.[38] The apparent reasons for passage of these

[38] Only twenty states now have statutes permitting warrantless arrest entries whose validity has gone unquestioned by their state courts. See Ala. Code §15-10-4 (1977); Alaska Stat. §12.25.100 (1972); Ark. Stat. Am. §43-414 (1964); Fla. Stat. Ann. §901.19 (1973); Hawaii Rev. Stat. §803-11 (1972); Idaho Code Ann. §19-611 (1948); Iowa Code Ann. §755.9 (1950); Kan. Code Crim. Proc. §22-2405 (1974); Miss. Code Ann. §99-3-11 (1972); Mo. Ann. Stat. §544.200 (1953); Mont. Rev. Code Ann. §95-602 (1969); Neb. Rev. Stat. §29-411 (1975); Nev. Rev. Stat. §171.138 (1967); N.Y. Crim. Proc. Law §§120.80, 140.15 (1971); N.C. Gen. Stat. §15A-401(3) (1978); N.D. Cent. Code Ann. §29-06-14 (1974); Ohio Rev. Code Ann. §2935.12 (1975); Tenn. Code Ann. §40-807 (1975); Tex. Code Crim. Proc. Art. 15.25 (Vernon 1977); Utah Code Ann. §77-13-12 (1968). Courts in five other states with statutes have seriously questioned their validity or applied exigency analysis without reaching the constitutional question. See *State v. Ranker*, ___ La. ___, 343 So.2d 189 (1977); *People v. Little*, 78 Mich. App. 170, 259 N.W.2d 412 (1977); *State v. Lasley*, 306 Minn. 224, 236 N.W.2d 604 (1975); *State v. Girard*, 276 Ore. 511, 555 P.2d 445 (1976); *State v. Teuber*, 19 Wash. App. 654, 577 P.2d 149 (1978). On the other hand, sixteen states now authorize arrest entries only under warrant. See cases cited *infra* at pp. 57, 58 and Conn. Gen. Stat. Ann. §30-106 (1975); Ga. Code Ann. §27-205 (1972); Ky. Rev. Stat. §70.078 (1971); Okla. Stat. Ann. tit. 22, §194 (1969); S.C. Code Ann. §23-15-60 (1977); Wyo. Stat. Ann. §7-165 (1967). Thus, roughly equal numbers of states, including those whose only authority is statutory, now approve and disapprove warrantless arrest entries.

statutes show that the statutes themselves are irrelevant to interpretation of the Fourth Amendment. First, the statutes arose at a time when even respected commentators held the warrant to be only a matter of form, a view the codifiers probably shared. See, 1 J. Bishop, CRIMINAL PROCEDURE *supra*, at 109 n.6. Second, there was actually less need for a warrant requirement in an age where an officer faced substantial civil liability for an honestly mistaken arrest, for officers were thus deterred from acting in questionable situations. Finally, the codifiers, at least in New York, did not profess to take into account the privacy interests involved, but tried only to have the confusing law of arrest "compressed into a few plain and intelligible directions." *Report of the Select Committee for the Code of Criminal Procedure, New York State Assembly, submitted March 2, 1855*, at 87. Because the drafters of these statutes failed to take account of the role of the warrant in safeguarding Fourth Amendment interests, and because they sought merely to simplify arrest law, the statutes themselves provide no guide to construction of the Fourth Amendment.

With few exceptions, the courts which have examined the need for warrants in light of the Fourth Amendment interests they serve have rejected the old statutory position and have found a warrant requirement. In the federal courts, for example, six circuits now hold that the Fourth Amendment imposes a warrant requirement on entries to arrest,[39] while only

[39] *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1969); *United States v. Reed*, 572 F.2d 412 (2d Cir. 1978); *Vance v. North Carolina*, 432 F.2d 984, 990-91 (4th Cir. 1970); *United States v. Killebrew*, 560 F.2d 729 (6th Cir. 1977); *Salvador v. United States*, 505 F.2d 1348, 1351-52 (8th Cir. 1974); *United States v. Prescott*, 581 F.2d 1343 (9th Cir.

(continued)

two do not.[40] The great majority of those state courts which have been called upon to construe the Fourth Amendment in this area have also found warrants required. Thus, ten states now impose a warrant requirement by judicial construction[41] and only one has reached the same result as the New York Court of Appeals.[42]

In short, when courts have examined the propriety of

(footnote continued from preceding page)

1978). It is also significant that no Congressional enactment specifically authorizes warrantless entries to arrest. Compare, *United States v. Watson*, 423 U.S. at 415-16. Congress has repealed a provision of the District of Columbia Code which for a brief time authorized warrantless entries in the District of Columbia. Compare, former D.C. Code §23.591, P.L. 91-358, §210(a), with P.L. §93-481, §4(a); P.L. 93-635, §16. See, *In re R.A.J.*, 24 Cr. L. Rep. 2284 (D.C. Sup. Ct. December 11, 1978) (holding warrant required for arrest of juvenile in home).

[40] *United States v. Williams*, 573 F.2d 348 (5th Cir. 1978); *United States ex rel. Wright v. Woods*, 432 F.2d 1143 (7th Cir. 1970).

[41] *State v. Cook*, 115 Ariz. 188, 564 P.2d 877 (1977); *People v. Ramey*, 16 Cal.3d 263, 545 P.2d 1333, *cert. denied*, 429 U.S. 929 (1976); *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971); *People v. Trull*, ___ Ill. App.3d ___, 380 N.E.2d 1169, 1173 (1978); *Stuck v. State*, 255 Ind. 350, 264 N.W.2d 611 (1970); *Commonwealth v. Forde*, 367 Mass. 798, 329 N.E.2d 717 (1975); *Nilson v. State*, 272 Md. 179, 321 A.2d 301 (1974); *Dent v. State*, 33 Md. App. 547, 365 A.2d 57 (1976); *Commonwealth v. Williams*, ___ Pa. ___, 24 Cr. L. Rep. 2241 (1978); *State v. Max*, 263 N.W.2d 685, 687 (S.D. 1978); *Laasch v. State*, 84 Wisc.2d 587, 267 N.W.2d 278 (1978).

[42] See, *State v. Perez*, 277 So.2d 778, 782-83 (Fla.), *cert. denied*, 414 U.S. 1064 (1973). *People v. Eddington*, 23 Mich. App. 210, 173 N.W.2d 686 (1970), *aff'd*, 387 Mich. 551, 198 N.W.2d 297 (1972) is often cited for this proposition also, but subsequent cases from Michigan throw its validity into some doubt. See, *People v. Burrill*, 391 Mich. 124, 214 N.W.2d 823 (1974); *People v. Little*, 78 Mich. App. 170, 259 N.W.2d 412 (1977).

warrantless arrest entries in light of the concerns of the Fourth Amendment, rather than the concerns of ancient law, they have concluded that they are subject to the warrant requirement. They have found in the Fourth Amendment the very principles which must govern this case:

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

United States v. Reed, 572 F.2d at 423. Because of the substantial privacy invasion involved, and because, unlike the common law, the Fourth Amendment values the warrant as the chief safeguard of privacy, warrants are required for entries of the home to arrest.[43]

[43] Although we have demonstrated above that the common law of arrest affords no support for the decision below, we note that the common law is not, in general, determinative of Fourth Amendment issues. In the most fundamental areas of Fourth Amendment jurisprudence, indeed, the Court has rejected the approach of the common law. In *Warden v. Hayden*, 387 U.S. 294, 300-10 (1967), for example, the Court rejected the common law view of what property was subject to seizure, and held, contrary to the early precedents, that "mere evidence" could be seized. Similarly, in defining the scope of a "search" under the Fourth Amendment, the Court in *Katz v. United States*, 389 U.S. 347, 352-53 (1967) repudiated the view of *Olmstead v. United States*, 277 U.S. 438 (1928) that eavesdropping involved no search because there was no common law trespass. See, Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 381-82 (1974). Other common law rules of arrest law such as the "knowledge-suspicion" distinction or the misdemeanor warrant rule, appear never to have been absorbed into the Fourth Amendment. See, *United States v. Watson*, 423 U.S. 411, 455 n.21 (1976) (Marshall, J., dissenting); *Agnello v. United States*, 269 U.S. 29, 33 (1925).

V. No Exigent Circumstances Existed to Excuse the Failure of the Police to Obtain a Warrant Prior to their Breaking Open the Door to Payton's Apartment.

If our argument is correct that a warrant is required for entry to arrest within the home, then such a requirement can be dispensed with only upon a determination that there were exigent circumstances excusing the failure of the police to obtain one. *Coolidge v. New Hampshire,* 403 U.S. at 454-455; *Katz v. United States,* 389 U.S. at 357-58. Six of the seven judges below were of the view that no exigency was present in the *Payton* case. Only Judge Wachtler, who dissented on other grounds (A. 82-85), felt that such circumstances existed because the crime involved was a homicide and "for several days the police had been in continuous pursuit of the killer when they arrived at the defendant's apartment . . ." (A. 82).[44] This conclusion

[44]The prosecution, while arguing below that under the circumstances of this case the officers' entry into Payton's apartment met the constitutional standard of "reasonableness," also insisted that the record did not afford a basis for determining whether or not there existed exigent circumstances. This assertion is based on a claim that the prosecution was not permitted the opportunity to demonstrate what happened between the time Detective Malfer first went to Payton's address on January 14 and the time he returned on the morning of January 15. See, Appellee's Motion to Defer Consideration, (filed with this Court) pp. 21-28. However, the record created no problem for resolution of the issue in the court below. The majority opinion states definitively that there were no exigent circumstances (A. 69, 74) and the opinions of both Judges Wachtler and Cooke, while differing, show a full exploration of the question (A. 81-82, 92-93). Moreover, at the suppression hearing, the prosecutor was fully aware that the warrant requirement was in issue (A. 8) and that if there were exigent circumstances, it was the prosecutor's burden to establish them. *Mc Donald v. United States*, 335 U.S. 451, 455-56 (1949). Not only did he choose not to do so, he objected to defense counsel's inquiry as to whether Detective Malfer had acquired any additional information during the interval between his visits to Payton's apartment (A. 34).

is neither consistent with this Court's elucidation of the exigent circumstances doctrine nor supported by the facts of this case.

In describing the circumstances under which the warrant requirement of the Fourth Amendment may be dispensed with, the Court has emphasized that there must be "exceptional circumstances," or a "grave emergency," and that the burden is upon "those who seek exemption from the constitutional mandate [to demonstrate] that the exigencies of the situation made that course imperative." *Mc Donald v. United States*, 335 U.S. 451, 454-456 (1949).

Thus, exigent circumstances have been found to exist where there was danger of flight [*Johnson v. United States*, 333 U.S. at 15], where there was danger of imminent destruction of evidence [*Schmerber v. California*, 384 U.S. 757, 770-71 (1966)], where the search was incident to a lawful arrest [*Chimel v. California*, 395 U.S. 752], or where the police were in "hot pursuit" of a suspect. *Warden v. Hayden*, 387 U.S. at 297-99; see, also, *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). Nothing remotely resembling these exigencies is present in this case.

That Payton was sought for a homicide did not, of itself, create any exigency. In rejecting Arizona's purported "homicide-scene" exception to the warrant requirement, the Court specifically declined "to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Mincey v. Arizona*, 57 L.Ed.2d at 301.

Moreover, despite the nature of the crime, the facts demonstrate that the police themselves perceived no

need to act as though speed were essential. See, *Warden v. Hayden, supra*, 387 U.S. at 299. Detective Malfer knew Payton's identity and address the day before the break-in. He had been taken to Payton's apartment sometime after noon on January 14, 1970. By that time, he knew precisely what crime Payton was accused of and he was aware of all the facts which established probable cause. Despite that knowledge, he made no immediate attempt to arrest Payton nor did he arrange to keep Payton's apartment under surveillance. Since he did not return to Payton's home until the next morning, Malfer had the remainder of the day and evening of the 14th to obtain a warrant.

Having bypassed one opportunity to get a warrant, Malfer did so a second time the following morning. When he returned to Payton's apartment with four other police officers, they had to delay their entry further until other officers from the Emergency Services Division could arrive to assist in breaking through Payton's door. According to Malfer, all avenues of escape were so well covered that he had not the slightest concern that Payton would escape during the time it would take Emergency Services to respond. If, as Malfer maintained, the situation was sufficiently well in hand that the additional delay was of no particular moment, then there was no urgent need to forego this further opportunity to obtain a warrant, even if it would have required a slightly longer delay. See, *United States v. Jeffers*, 342 U.S. 48, 52 (1951) ("the officers admit they could have easily prevented any such destruction or removal by merely guarding the door"); *United States v. Calhoun*, 542 F.2d 1094, 1102 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977)

("The availability of an alternative further suggests that exigent cicumstances did not exist. There were sufficient officers in the area that, instead of entry, they might have maintained surveillance while a warrant was sought."). Consequently, the amount of time which the police allowed to pass between the time they acquired probable cause and their entry into Payton's apartment demonstrates that it was not the exigencies of the situation which precluded their obtaining a warrant. See, *G.M. Leasing Corp. v. United States*, 429 U.S. at 358-59. Since the heart of the Fourth Amendment is the command that absent exigent circumstances a person's home may be invaded only after a determination by a neutral magistrate, the entry into Payton's apartment was unreasonable.[45]

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[45]Because the District Attorney has conceded that there was no exigency in *Riddick*, we treat the subject only briefly and merely to underscore the basis for that concession and to illustrate that obtaining an arrest warrant would have been no hindrance whatsoever to the police. Riddick had been living at the same address for two years, as his parole officer undoubtedly knew. The crime for which he was arrested had occurred years before. Under these circumstances there was no danger of sudden escape or destruction of evidence. The actions of the police confirm the lack of exigency, for even after ascertaining Riddick's address they waited weeks to make the arrest. In cases like Riddick's, the requirement that police obtain a warrant for an entry places absolutely no burden upon them. They may seek it as soon as they have probable cause to arrest or only at the last minute. Since the police have ample time to obtain the warrant, the delay involved in getting it does not hinder them, and their failure to do so is inexcusable.

VI. The Extreme Force Employed to Gain Entry to Payton's Apartment, in the Absence of Exigent Circumstances, Constitutes an Additional Ground for Holding the Conduct of the Police Unreasonable Under the Fourth Amendment.

We have argued above that a warrant to arrest within the home is required by the Fourth Amendment for any non-consensual entry when there are no exigent circumstances. In the *Payton* case, however, the police entry was not only non-consensual, it was also forcible. The extreme force employed by the police to gain entry to his apartment constitutes a further basis for holding that Payton's Fourth Amendment rights were violated.

The primary argument of the Court of Appeals, in rejecting a construction of the Fourth Amendment which would require warrants in cases such as appellant Payton's, was that the intrusion on the home in such cases is less than the intrusion of a search. With regard to Payton's case, and to all cases where force is used to effect entry, the court's conclusion is manifestly false. The forcible breaking of a door is a far greater intrusion than the search because of the very violence it entails.

Because of the magnitude of this instrusion, the element of force has been specifically adverted to as a factor which might merit special treatment. *United States v. Santana*, 427 U.S. 38, 43-44 (1976) (White, J. concurring); *Coolidge v. New Hampshire*, 403 U.S. at 511 n.1 (White, J., concurring and dissenting, joined by Burger, C.J.); *Jones v. United States*, 357 U.S. at 499-500. There is sound basis for such concern. As Professor Amsterdam has observed, "[i]ndisputably,

forcible entries by officers into a person's home or office are the aboriginal subject of the Fourth Amendment and the prototype of the 'searches' and 'seizures' that it covers." Amsterdam, *Perspectives on the Fourth Amendment, supra*, 58 Minn. L. Rev. at 363.

At common law, there was considerable discussion about the "extremity" of the breaking down of doors, and the view was stated that "the breaking an outer door is, in general, so violent, obnoxious, and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." R. Burn, JUSTICE OF THE PEACE 303 (30th ed. 1869), quoted in *Accarino v. United States*, 179 F.2d at 461; see, e.g., 1 J. Chitty, CRIMINAL LAW 52 (3rd Am. ed. 1836) ("extreme violence"); 1 W. Russell, CRIMES AND MISDEMEANORS 629 (5th Am. ed. 1845) ("this extremity"); 1 E. East, PLEAS OF THE CROWN 322 (1803) ("this extremity").

As we have earlier pointed out (*supra*, n.26) the term "breaking" at common law was broad enough to encompass a wide variety of non-consensual entries. That in no way detracts, however, from the obvious concern with those breakings which were of the more violent nature and indeed left the suspect's family open to the elements. See, *Lee v. Gansel*, 1 Cowp. 1, 6, 98 Eng. Rep. 935, 938 (1774) where Lord Mansfield, discussing breakings to execute a warrant, wrote:

> The ground of this; that otherwise the consequences would be fatal for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law,

> that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences.

The element of force has also been a factor which a number of states[46] have thought sufficiently important to justify imposition of the warrant requirement, as have a number of courts. See, e.g., *Accarino v. United States*, 179 F.2d 456; *Commonwealth v. Forde*, 367 Mass. at 807, 329 N.E.2d at 723 ("Additional considerations testing the reasonableness of police conduct are whether the entry is peaceable and whether the entry is in the nighttime.").[47] And as the Chief Justice, then Judge Burger has written, " 'a forcible entry into a house is justified only when an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate.' " *Chappell v. United States*, 342 F.2d 935, 938, n.5 (D.C. Cir. 1965), quoting from *District of Columbia v. Little*,

[46]Conn. Gen. Stat. Ann. §30-106 (1975) (only into disorderly house); Ga. Code Ann. §27-205 (1972); Ky. Rev. Stat. §70.078 (1971); Okla. Stat. Ann. tit. 22, §194 (1969); S.C. Code Ann. §53-198 (1977); Wyo. Stat. Ann. §7-165 (1967).

[47]The American Law Institute has proposed that a warrant be required for forcible entries but only for "nighttime" entries, i.e. those undertaken between the hours of 10 p.m. and 7 a.m. ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, §120.6 (1975). At least one commentator has criticized the arbitrariness of such a provision and further pointed out that "the intensity of the intrusion is a function of more than the lateness of the hour of entry." Haddad, *Arrest, Search and Seizure—Six Unexamined Issue in Illinois Law*, 26 DePaul L. Rev. 492, 526-27 (1977). This case demonstrates the wisdom of that criticism. Forcible entry of Payton's apartment was attempted initially between 7:15 and 7:30 a.m., some fifteen to thirty minutes too late to qualify, under the ALI proposal, as a "nighttime" entry. But the force employed was far more critical to the degree of the intrusion than the passing of a few minutes and must be accorded far greater weight.

178 F.2d 13, 17 (D.C. Cir. 1949).

The force employed in this case, the breaking open of an apartment door with crowbars, was of course extremely severe. Had anyone been inside and awakened from a deep sleep, the noise of metal on metal, the locks being strained and broken, and the final burst of the officers entering would have been a terrifying experience.[48] The sudden entry of officers might then incite forcible resistance from an otherwise compliant occupant. The actual property destruction involved and the potential for further violence dictate that such actions be subject to procedural restraints. Regrettably, there arise circumstances in which the police must use force to enter a home in the interest of public safety. However, when there is no exigency, the decision to employ violent methods should not be left to their unfettered discretion. It follows that when the sanctity of the home is to be abruptly intruded upon with the kind of force applied in this case, such intrusion should be predicated upon the authorization of a neutral magistrate.

In such cases, for the reasons we have discussed above, that requirement places no burden upon the police; indeed some police departments have a stated policy of obtaining a warrant where an arrest will require a forcible entry. W. LaFave, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 45 (1965). Their reason for such a policy is that they themselves

[48]At an early hour of the morning, the failure to answer an apartment door cannot be conclusive proof that no one is within. Indeed, in this case, it is less than clear that the police gave notice of their authority and purpose, as Malfer testified only that he had knocked on the door (A. 13-14).

believe it confers positive benefits: "because police entry into private homes is undoubtedly one of the most sensitive of all law enforcement practices, the warrant serves the very important function of insulating the police from criticism by giving the appearance that they have selected 'that legal course which conforms most to democratic values.' " *Id.* at 45-46. Because no exigent circumstances justified a warrantless entry into Payton's apartment, the violent nature of the entry constitutes an additional basis for the conclusion that Payton's Fourth Amendment rights were violated.

CONCLUSION

For the above reasons, the judgment of the Court of Appeals upholding New York's statutory provisions authorizing warrantless, non-consensual and forcible entries into private dwellings should be reversed.

Respectfully submitted,

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January, 1979

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5420

THEODORE PAYTON, *Appellant,*

v.

NEW YORK, *Appellee.*

No. 78-5421

OBIE RIDDICK, *Appellant,*

v.

NEW YORK, *Appellee.*

Appeals from the New York Court of Appeals

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Questions Presented

1. Both cases present the following question: when there is probable cause to believe that a person has committed a violent felony such as murder (*Payton*) or armed robbery (*Riddick*), does the Fourth Amendment prohibit a

police officer from arresting that person in his dwelling during the daytime without an arrest warrant?

2. In *Payton,* there is an additional question: is the appellant entitled to the benefits of the exclusionary rule when (1) police officers found the evidence in plain view after they entered appellant's apartment to arrest him under the express authority of a state statute, and (2) they did so at a time (January, 1970), when neither they nor any other law enforcement official could have had any serious doubt about the legality of following the statute?

Statement of the Case

Payton v. *New York,* No. 78-5420

On Monday morning, January 12, 1970, Theodore Payton, armed with a .30 caliber rifle and wearing a ski mask, walked into a gas station in Manhattan. He demanded the weekend receipts from the manager who was working on them at his desk in the office. The manager complied but then resisted Payton's further demand that he open the safe in the adjoining repair shop. Payton shot the manager during the struggle that followed and escaped with approximately $1,000. The manager died.

Intensive investigation led police officers, three days later (January 15, 1970), to Payton's apartment at about 7:30 in the morning. When the officers arrived, a light was shining from under the door, and a radio could be heard from inside. Believing Payton to be inside, they knocked and called out, but there was no answer. The officers saw that they could not open the metal door, so they called for

help which came about a half hour later. Then, with crowbars, they forced the door open and entered Payton's apartment to arrest him. They entered the apartment under the explicit authority of a state statute that permitted the police, without a warrant, to make such entries in order to arrest felons.* For almost one hundred years this statute had governed procedures for making arrests; its constitutionality had never been seriously questioned.

The officers looked through the apartment for Payton. He was gone. However, in plain view on a stereo set in the living room the officers saw a .30 caliber shell casing which they seized. They also found three photographs of Payton wearing a ski mask, a bill of sale for a .30-30 Winchester rifle, a shotgun, and a bandolier with 14 bullets.

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* Code Crim. Proc. (McKinney 1958 and Supp. 1970):

Chapter IV.—Arrest by an Officer Without a Warrant

* * *

§177. *In what cases allowed*

A peace officer may, without a warrant, arrest a person,

* * *

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

* * *

§178. *May break open a door or window, if admittance refused*

To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance (footnote omitted).

The Pre-Trial Hearing and the Decision on the Motion to Suppress

Payton was indicted on March 30, 1970 for felony-murder and for intentionally murdering the gas station manager. After a four-year delay, attributable in large part to Payton's commitment as incompetent to stand trial (A.1)* and to his requests for adjournments (T.100),** a pre-trial hearing was held on Payton's motion to suppress the evidence seized from his apartment. Before the hearing, the prosecutor announced that he intended to introduce only the .30 caliber shell casing. He conceded that the other items were seized illegally because they were not found in plain view (A.3-7).

Because of the prosecutor's concession, the scope of the hearing was narrow. It did not focus on the investigation that led the officers to Payton's apartment on the morning of January 15. Instead, it focused on whether their purpose in entering the apartment was in fact to arrest him and whether the shell casing was in fact seen in plain view. The judge's rulings were similarly limited. The judge did not discuss the constitutionality of the Code of Criminal Procedure Sections 177 and 178. Although the opinion did mention that on January 14 the police learned Payton's address and that Payton was the murderer, it did not discuss when on January 14 they first had probable cause to believe he was the killer; when on January 14 they first had probable cause to believe they knew where he lived; when they first had probable cause to believe he was

* References preceded by the letter "A." are to the Appendix.

** References preceded by the letter "T." are to pages of the record not in the Appendix.

at home; when they first decided to arrest him; whether, at that time, they made a decision to arrest him in his apartment; and if not, when they made that decision; whether the officers had time to obtain an arrest warrant; or whether there were any circumstances that might excuse their failure to do so.

The judge simply found that there was probable cause to arrest Payton; that the officers entered his apartment for that purpose; that pursuant to the Code of Criminal Procedure Sections 177 and 178 they did not need an arrest warrant to make such an entry; and that once lawfully in the apartment, they could seize the shell casing which they had seen in plain view (A.39-41). Although the issue was not raised by defense counsel, the judge also ruled that the exigencies of the situation excused the officers from the statutory requirement that they announce that their purpose was to arrest the defendant. He based this ruling on his findings that (1) "a grave offense had been committed;" (2) "the suspect was reasonably believed to be armed and could be a danger to the community;" (3) there was a "clear showing of probable cause;" and (4) there was "strong reason" to believe that Payton was in the apartment and "would escape if not swiftly apprehended" (A.41).

Because the hearing and the judge's findings were so limited, the proceedings on the motion to suppress do not give this Court a full picture of the investigation that led the officers to Payton's apartment on January 15. Accordingly, both Payton and we refer to the testimony at the trial, which added some detail to the broad outlines revealed at

the suppression hearing.* In addition, in a few places we refer to police documents which were marked for identification at the hearing or the trial, given to defense counsel, and used by them in their cross-examination of the state's witnesses. We do so in order to indicate that even more information about the investigation could be developed and to suggest why, depending on what legal principles are ultimately held to govern this case, a remand might be necessary. *See Killian* v. *United States,* 368 U.S. 231 (1961). *See* pp. 80-81, *infra.*

The Investigation that Led the Officers to Payton's Apartment on January 15, 1970

January 12, 1970

The murder occurred at about 8:40 a.m. on Monday, January 12, 1970. The police were called, and a patrol car arrived almost immediately (T.261-63). Detective Malfer, who supervised the investigation, arrived at the gas station at about 9 a.m. He searched the scene, found two .30 caliber shell casings, called for police ballistics experts, fingerprint experts and photographers, spoke briefly with the people who had witnessed the murder, and had them transported to the 23rd Precinct which was nearby. At the 23rd Precinct, Detective Malfer took statements from the eight people who had been at the gas station. None said he or she recognized the man (A.11, T.802-14, 982).

* Indeed, based on the more detailed testimony at trial, defense counsel sought the right (which was granted but not ultimately exercised), to reargue the admissibility of the shell casing (T.837-38).

In fact, two of the eight did know and recognize the killer in spite of his disguise. The first, Melvin Gittens, was at the gas station with his sister and brother-in-law. They were waiting to meet Gittens' lawyer (Robert Stein), before all of them went to the 23rd Precinct where Gittens was to surrender on a charge that he had killed a man in a barroom fight the previous Friday, January 9 (T.284, 291, 294, 337-38, 454-56). Gittens recognized Payton because the two had known each other all their lives, had attended the same junior high school, had seen each other frequently thereafter when they were growing up in the same neighborhood, and, during the year preceding the murder, had seen each other two or three times a week at local bars (T.285-86, 306-18, 331-32, 365-66).

At the 23rd Precinct, Gittens told his sister that he knew the killer and, after some thought about the killer's last name, told her the name was "Teddy Pane" (T.413-14, *see also* T.365). Stein told Gittens that this information might be helpful on his own case, and that he, Stein, wanted to handle the divulgence of that information (T.462). When Gittens spoke to the police that morning, he gave them an account of what he had seen. He did not tell them he knew the killer (T.292-93, 304, 813-14).*

* Raymond Williams, an attendant at the gas station, was the second person who recognized Payton on January 12. The two had known each other for more than a year and had met more than a dozen times in a bar at which Williams had worked (T.495, 527-28). A few weeks before the murder, Williams was at the gas station when Payton had a dispute with another attendant. Williams settled the dispute (T.494, 495-98). Williams did not identify Payton to the police on January 12. He had an extensive criminal record, had not told his employer about it, and was afraid of being exposed if he got "involved" in this case. It was not until January 27, when Detective Malfer re-interviewed Williams, that he identified the killer as Payton (T.498-501, 541-43, 545-53).

January 13, 1970

The day after the murder, January 13, 1970, Detective Malfer spent going back to the gas station, looking for more evidence and for other possible witnesses (T.814).

January 14, 1970

Meanwhile, Stein had arranged a meeting at which his client would divulge his information. On the morning of January 14, Stein and Gittens met with Detective Malfer at the District Attorney's Office. There, Gittens told the detective the name of the killer (T.293, 304, 379-83). Although not explicitly stated in the record, it is likely that Gittens gave the name "Teddy Pane" since that is the name by which he knew the killer (*see* T.413-14).* Thus, for the first time Detective Malfer had a name (albeit not the correct one)—but not a face, a body, or an address to go with it.

When Detective Malfer's interview with Gittens ended is not expressly stated in the record. However, the record does indicate that the interview must have lasted until early afternoon, because, as Gittens testified, he was at the District Attorney's Office "a good while," and he missed lunch (T.381). In any event, after the interview Detective Malfer received a call from the 23rd Precinct directing him to the 40th Precinct in the Bronx, where he was to meet someone with information about the murder (T.816).

At the 40th Precinct, Detective Malfer met Jesse Leggett, a friend of Payton's. Again, the time of this meeting is not stated explicitly in the record but can be reconstructed from Leggett's testimony about what he had done earlier that day. At about 10:30 or 11 a.m. Leggett was at a bar in the Bronx. He was picked up by the Nassau County Police and taken to Nassau County. He was a suspect in a robbery there (as was Payton) and was questioned by the Nassau Police for one to one and a half hours. Then Leggett was brought back to the 40th Precinct in the Bronx where Detective Malfer met him (T.722-25, 728-32). Thus, Leggett's interview with Detective Malfer took place, at the earliest, in the mid-afternoon.

Leggett gave Detective Malfer the following account: Two days earlier, on January 12, 1970, Leggett had heard about the murder from his friend, Raymond Williams, the gas station attendant. Leggett bought a copy of the early edition of the next day's *Daily News,* which contained an article describing "the slaying of a service station manager in East Harlem * * * [who] was cut down at nine a.m. by two shots in the chest from a rifle fired by [an approximately 30 year old] thug" (T.666, 676-77, 794-796A). At about 9:15 that evening (January 12), "Teddy" came in and said, "Jessie, I got a problem. * * * I did something I'm sorry for. * * * I hit a gas station." Leggett then showed "Teddy" the article about the incident in the *Daily News* and asked, "[W]as that him?" "Teddy" responded, "Yes" (T.664-65, 670-71).*

* Detective Malfer's notebook for this case contains a summary of this interview and has the following entry: "Knows perpetrator as Teddy Paine—Payne" (T.297, People's Exh. 4F for Id., Entry for Wed. Jan. 14, 1970, 10 a.m.).

* The signed statement Leggett gave to Detective Malfer on January 14 (T.678, People's Exh. 4R for Id.) is quoted below:

> On Monday evening, about 9 or 10 PM, I stopped at the Shannon View Bar on Cypress Avenue, between 138 Street, and 139 Street. Teddy came in, came over to me, said "I did something today that I am sorry for. I said, "what happened." He said "I can't tell you.' I said "what did you

(footnote continued on next page)

After giving his statement, Leggett drove with Detective Malfer through the Bronx and pointed out the five or six story building where "Teddy" lived. Neither the police nor Leggett went into the building (T.671-72, 783-90, 816-17), but Leggett told Detective Malfer that Payton lived on the top floor (A.11, 34). They returned to the 23rd Precinct in Manhattan where Leggett was shown a series of photographs. At the trial, because of a defense objection, Leggett did not testify about the photographic array (T.817). But Detective Malfer's notebook contains the following entry:

> 1/14/70-Wed: 7:25 PM
>
> In 23RD Sqd office, six (6) photos, numbered on back shown to Jesse Leggett, he picked #4—which was photo of Teddy Payton, and said, "that is the one who told me, he was sorry for shooting the guy in Gas station." (A.20, T.12-13, 829-30, People's Exh. 2 for Id.).

Undoubtedly, the police must have had the name "Teddy Payton" before Leggett was shown the photographic array; otherwise they would not have had Payton's photograph in

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do." He said "I shot a guy, but I didn't mean to do it, I swear I didn't mean to do it, I swear I didn't want to hurt anybody." So I said again, "what happened?" He said I hit a gas station and the guy grabbed the gun by the muzzle, I didn't mean to shoot him. I showed him a copy of the Daily News. he read the article, said again, sorry, I didn't mean to do it. Actualy, he read the article before he told me what had happened. I told him, go home and get some sleep. He said I can't sleep I'm too worried. I said, "what are you going to do." He said "I'm going to go some-where. In a few minutes he left. This was the last time I saw him.

The reason I giving this qutocation I think teddy is mixed up and I dont want to see him hurt because he is a very nice guy.

/s/ Jesse James Leggett

(Notebook Entry for Wed. Jan. 14, 1970).

the array. How or at what time they first learned the name, however, is not in the record. Perhaps Leggett had mentioned it earlier. Perhaps the police did a check of utility companies after Payton's building was pointed out by Leggett. Or perhaps they learned the name in another way not suggested by the record. In any event, after the photographic array, the police had, for the first time, connected the murder with the name of Theodore Payton, a face, and an address.

The record does not state what Detective Malfer did after Leggett identified Payton's picture.* There is nothing to indicate that he and his fellow officers immediately formulated a plan to arrest Payton in his apartment the next morning. True, by then, the officers had probable cause to believe Payton was the murderer; and someone claiming to be a friend of Payton's had pointed out where he lived. However, they also had some reason to believe he might not be there. Payton knew several people at the gas station and must have been worried that they also recognized him. Going home after the murder would not have been his safest course.** Moreover, in no event would the officers have wanted to arrest Payton in his apartment without doing much more planning and work. A private dwelling is a very dangerous place—perhaps the most dangerous place—in which to arrest a murderer who may still have his weapon. Before deciding to arrest him

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* Detective Malfer's memorandum book indicates for January 14: "From Duty 10:30 PM." (T.830, People's Exh. 4T for Id.).

** According to Leggett's statement contained in Detective Malfer's notebook, Payton had said on the evening of January 12 that he was worried, could not sleep and was going "some-where." *See* note at pp. 9-10, *supra*.

there, the officers would have wanted to explore the possibility of finding him somewhere else. At a minimum, if they could not find another place to arrest him, they would have wanted to know more about the building and his apartment in order to minimize the danger to themselves, to Payton, and to innocent bystanders. Who else lived in the building? In his apartment? Was there a floor plan of the apartment available? What would his possible escape routes be?

In fact, the officers did go to arrest him in his apartment the next morning, January 15, at 7:30 a.m., which itself is a strong indication that they had not formulated a plan the night before. If they had, it is likely that they would have arrived earlier, before sunrise, indeed before daylight. Then the officers would have been able to knock on the door at the first light—a relatively less dangerous time because it permits an arrest during daylight but still at an hour when the defendant is likely to be surprised.*

January 15, 1970

Five police officers arrived at the building at 7:30 a.m. (A.12, T.817). "[E]very angle" was covered, although Detective Malfer, testifying four years after the events, could not recall precisely where each officer was stationed (T.898-904). As Detective Malfer approached the door of the apartment, he saw a light from underneath the door and heard a radio from inside. One of the officers knocked

* The fact that the officers did not, on the evening of January 14, formulate a plan to arrest Payton in his apartment is also suggested by Detective Malfer's memorandum book entry for January 15:

> Jan. 15, 1970—Special assigned U.F. 61 #491 (Homicide) *In 23RD Squad office 7 AM* under the Command of Sgt. Hoarty: RE: *Information Perpetrator Teddy was at his home*: 682 E. 141 St. 5C (T.830, People's Exh. 4T for Id.) (emphasis added).

on the door and called out, but there was no answer. The officers saw that they could not open the metal door, so they called Emergency Services, which arrived about a half hour later. With crowbars, they forced open the door and entered (A.12-14, 24-27, T.817-19, 899-902).

They looked through the apartment for Payton, but he was gone. However, the officers saw in plain view on the top of a stereo set a .30 caliber shell casing which they seized. In addition, they found a shotgun and bandolier with 14 bullets in a clothes closet or a linen closet. Either in a drawer or on top of a bureau, the officers found three pictures of Payton in a ski mask and a receipt for a .30-30 Winchester rifle (A.15, 17-18, 28-30). All but the shell casing was suppressed on consent of the prosecutor before the suppression hearing.

The Trial, Conviction, and Affirmance by the Appellate Division

At trial, Gittens and Williams, the two people who knew Payton and recognized him at the gas station, testified that he was the murderer (T.284-88, 365, 492). In addition, Leggett testified that on the evening of the murder, Payton had come to a local bar and admitted committing the crime (T.663-67, 676-77). Finally, there was testimony linking Payton with the murder weapon. Ballistics experts testified that the .30 caliber shell casing found in Payton's apartment three days after the murder was fired from the same rifle as were the fatal shots (T.806-13, 819-23, 1010-15). A gun dealer from upstate New York testified that he had sold a .30-30 Winchester rifle to Payton about two months before the murder (T.592-97, 608, 618-19, 634).

On June 21, 1974, the jury convicted Payton of felony murder but could not reach a verdict on the count charging intentional murder (A.1, T.1267, 1303-05). On October 29, 1974, he was sentenced to a term of imprisonment of from 15 years to life (A.1). On December 16, 1976, the Appellate Division unanimously affirmed the judgment without opinion (A.42-43).

Riddick v. *New York*, No. 78-5421

At about noon on March 14, 1974, police officers went to Riddick's apartment to arrest him on several robbery charges. They knocked on his door, which was opened by his son, saw Riddick sitting up in bed with his hands under a sheet, walked in, announced their authority, and arrested him.* In a search incident to that arrest, the officers dis-

* CRIM. PROC. LAW (McKinney 1971):

§140.10. *Arrest without a warrant; by police officer; when and where authorized*

1. * * * [A] police officer may arrest a person for:

* * *

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

§140.15. *Arrest without a warrant; when and how made by police officer*

1. A police officer may arrest a person for an offense, pursuant to section 140.10, at any hour of any day or night.

* * *

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

(footnote continued on next page)

covered heroin and related narcotics implements. On April 16, 1974, Riddick was indicted for criminal possession of a controlled substance in the fifth degree (more than one-eighth of an ounce of heroin) and for criminally possessing a hypodermic instrument.

The Pre-Trial Hearing and Decision on the Motion to Suppress

Detective Fred Bisogno testified that in June, 1973 he learned that Riddick was wanted in connection with several robbery charges (A.52). At "some [unspecified] time" prior to the arrest on March 14, 1974, complainants in two of these cases had picked Riddick's picture from a photographic array (A.59). In at least one case, a weapon had been used.

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§120.80. *Warrant of arrest; when and how executed*

1. A warrant of arrest may be executed on any day of the week and at any hour of the day or night.

* * *

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

(a) Result in the defendant escaping or attempting to escape; or

(b) Endanger the life or safety of the officer or another person; or

(c) Result in the destruction, damaging or secretion of material evidence.

5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary.

Although Detective Bisogno first learned Riddick's "whereabouts" in January 1974 (A.53), it is not clear that the police then had enough information to locate Riddick in order to arrest him. In fact, the detective testified that Riddick "had been in the hospital, Harlem Hospital, under an assumed name, and we had lost all contacts with him" (A.59). In addition, Riddick's appearance had changed from how he looked in a picture in the police's possession (A.51). Because Riddick had been on parole, his parole officer was approached for help (A.51). Either through him, or by other means, the detective did eventually locate Riddick.

At about noon on March 14, 1974, Detective Bisogno together with two other detectives and a parole officer, arrived at Riddick's apartment. The parole officer entered first, exited, and gave a signal. Then Detective Bisogno approached the door. He did not demand entry. He simply knocked. Riddick's son opened the door, and the detective, still standing outside the door, saw Riddick in a bedroom, seated in bed, with his hands underneath a waist-high sheet. Detective Bisogno walked in, announced his authority, and asked the defendant whether his name was Obie Riddick. When Riddick said yes, he was arrested. Fearing that Riddick might have a weapon, the detective—who was holding his own hand on his gun, which was in his pocket—asked Riddick to take his hands from beneath the sheet and get out of bed (A.48-49, 53-55, 57-58).

When Riddick stood up, the detective saw that Riddick was dressed in underwear only. As a safety measure, while his partner watched Riddick, Detective Bisogno searched

the bed and a dresser two feet from the bed. In the top drawer of the dresser, Detective Bisogno discovered the contraband (A.50, 55-57).

The court found the facts essentially as Detective Bisogno had stated them. It held that there was probable cause to arrest Riddick and further, that under Criminal Procedure Law Section 140.10(1)(b), the officers did not need a warrant to effect the arrest. Finally, the court upheld the search incident to the arrest because the officers could reasonably expect that Riddick, a suspect in several armed robberies, might have concealed a weapon in the nearby chest into which he would have to go to get clothes (A.63-66). The judge did not discuss whether it was constitutionally permissible to enter Riddick's dwelling without an arrest warrant.

The Guilty Plea, Sentence and Affirmance by the Appellate Division

After the court denied the motion to suppress, Riddick, on August 19, 1974, pleaded guilty to the lesser charge of criminal possession of a controlled substance in the sixth degree (A.44). On September 24, Riddick was sentenced to an indeterminate prison term of from two and one-half to five years (A.44). He appealed the denial of his motion to suppress, *see* N.Y. Crim. Proc. Law §710.70(2) (McKinney 1971), and the Appellate Division affirmed, with one judge dissenting. By the time of oral argument in this Court, Riddick will no longer be serving the sentence in the instant case, although he will still be incarcerated for armed robbery.

Opinion of the New York Court of Appeals

In the Court of Appeals, a majority of four judges (per Jones, J.) affirmed both convictions, holding that because the officers had "unquestionable probable cause" to arrest Payton for murder and Riddick for armed robbery (A.73-74), it was lawful to enter the dwellings to effect the arrests. The court upheld the constitutionality of the state statutes authorizing such entries without an arrest warrant.

The majority began with appellants' argument: Because a warrant is ordinarily required before the police may enter a dwelling to search for things, "symmetry" requires a warrant before an officer may enter a dwelling to arrest a felon (A.74). This argument was rejected because of the substantial differences between entering to search and entering to arrest. A search contemplates "rummaging through possessions," an "upheaval of the owner's chosen or random placement of goods and articles," and disclosure to the police of many personal items. Entry to search, therefore, "strip[s] bare * * * the privacy which normally surrounds [the householder] in his daily living" (A.75).

An entry to make an arrest, on the other hand, interferes with the privacy of the home to a lesser degree. "[T]here is no accompanying prying into the area of expected privacy attending his possessions and affairs." True, the majority recognized, arresting someone is of "grave import." However, this Court had already held, in *United States* v. *Watson*, 423 U.S. 411 (1976), that an arrest may be made in a public place without an arrest warrant. The majority concluded that the same rule should

apply if the arrest is in a dwelling. "[A]n arrest will always be distasteful or offensive, [but] there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable" (A.76).

After concluding that an arrest warrant requirement is much less necessary than a search warrant requirement to protect the privacy of the home, the majority compared the governmental interest in arresting felons with the governmental interest in searching for things. Making entry to effect an arrest without an arrest warrant is "reasonable" in part because the community's interest in catching the felon is so strong. This interest is of a "higher order" than the interest in recovering contraband or evidence (A.76).

Finally, in concluding that it is "reasonable" within the meaning of the Fourth Amendment to arrest a felon in his dwelling without an arrest warrant, the majority relied upon "[t]he apparent historical acceptance in the English common law of warrantless entries to make felony arrests," "the existence of statutory authority for such entries in [New York] since the enactment of the Code of Criminal Procedure in 1881," "the fact that a number of jurisdictions other than [New York] have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purpose of arrest," and the fact that the American Law Institute's Model Code of Pre-Arraignment Procedure makes similar provision (A.76-78).

The majority then considered appellants' other arguments. It rejected Payton's contention that the officers did not really enter his apartment to arrest him (A.78). And it rejected Riddick's argument that the entry into his apartment was "statutorily invalid" because the officers failed to give notice of their authority and purpose before entering. The majority held that the statute was not violated because the entry was peaceable (A.80-81).

A fifth judge (Wachtler, J.), voted to reverse Payton's conviction on an issue not now before this Court.* However, he joined the majority in concluding that the shell casing was admissible. Although Judge Wachtler concluded that ordinarily the police need a warrant to enter a dwelling in order to arrest someone, he believed that the officers were excused from obtaining one in *Payton* (though not in *Riddick*). Judge Wachtler found that "from the time of the murder the police had actively sought the killer." Their "continuous and intensive investigation" led them to the door of Payton's apartment "where they had reason to believe he might be hiding." In these circumstances, Judge Wachtler believed "it was reasonable for the police to continue their pursuit into the apartment in order to take a dangerous killer into custody" (A.81-82).

* Judge Wachtler concluded that the evidence given by the upstate gun dealer concerning Payton's purchase of the .30 calibre Winchester rifle should have been excluded because it was the "fruit" of a receipt seized illegally from Payton's apartment on January 15 (A.82-85). The majority held, as did the trial judge and the Appellate Division, that the gun dealer's evidence would have "inevitably" been discovered even if the officers had never seen the receipt (A.78-80). Payton sought review in this Court of the question whether the gun dealer's evidence should have been admitted; however, in noting probable jurisdiction, this Court denied review of the question concerning this evidence (A.97).

Two other judges (Cooke and Fuchsberg, JJ.) also concluded that police officers ordinarily need a warrant to effect an arrest for a felony in a dwelling. They believed that there should be a warrant requirement "regardless of the purpose for which [the] entry is sought" (A.85, 88). These two dissenters found no circumstances sufficient to excuse the failure to get an arrest warrant either in *Payton* or in *Riddick* (A.85, 92-93).*

Summary of Argument

A reading of appellants' brief might lead one to assume that the issue in this case is whether privacy interests are involved—and therefore whether the Fourth Amendment applies—when a police officer makes a felony arrest in a dwelling. Appellants, however, are debating false issues. Of course there are privacy issues involved; and of course the Fourth Amendment applies to arrests within dwellings. The issue is not whether the Fourth Amendment applies but what it commands. Specifically, when a police officer has probable cause to believe a person has committed murder (*Payton*), or an armed robbery (*Riddick*), does the Fourth Amendment prohibit the officer from arresting the defendant in his dwelling during the daytime without an arrest warrant?

Even this way of stating the question is somewhat misleading because it ignores the fact that the question has

* Contrary to appellants' statement repeated several times (Appellants' Brief at 18, 60 & n.44), the majority made no decision about the existence of "exigent circumstances." It ruled that, regardless of whether there were "exigent circumstances," no warrant was required (A.69). The majority was obviously describing appellants' argument, and not its own conclusion, when it used the words "absent exigent circumstances (of which there were none here)" on page A.74.

already been answered quite clearly in the negative by history. For hundreds of years, at common law, a constable was not required to obtain an arrest warrant before arresting a felon in his dwelling. The law recognized the overriding community interest in arresting dangerous criminals. Our English ancestors, however, were also very sensitive to the privacy interests involved whenever a person was arrested, and especially so when the arrest was effected by forcible entry into a dwelling. They chose to protect those privacy interests, not by requiring an arrest warrant, but (1) by requiring the constable to knock and announce his mission before he could enter forcibly, and (2) by holding him liable in damages unless he could make a sufficient showing, after the arrest, that he had arrested the right person. Far from being perceived as a protection, the arrest warrant was seen by some common law authorities as a dangerous device because it served to insulate the constable from liability.

The great spokesmen for liberty in the eighteenth century appreciated this common law heritage. They looked to it for inspiration when they criticized the government abuses that led to the Revolution. These spokesmen were condemning the growing abuses of power to issue and execute search and arrest warrants. Their remedy for these abuses was to reaffirm the principles underlying the common law of searches and arrests—principles which recognized the traditional authority of a constable, without an arrest warrant, to arrest a felon in a dwelling. The Fourth Amendment was intended to embody the same judgment.

Throughout the nineteenth and twentieth centuries it was accepted that a peace officer had the authority, without an

arrest warrant, to make felony arrests in dwellings during the daytime. As of 1975, thirty-six states had legislation on the subject; thirty of them had statutes authorizing such arrests. The American Law Institute has twice approved the validity of these arrests, once in 1932, and more recently in 1975. Until the dictum in *Coolidge* v. *New Hampshire,* 403 U.S. 444 (1971), this Court accepted their validity without question (although without directly deciding the point). Just three years ago, in *United States* v. *Watson,* 423 U.S. 411 (1976), and *United States* v. *Santana,* 427 U.S. 38 (1976), again without deciding the point directly, this Court went far towards recognizing and approving the policies that require that peace officers have the authority to make such arrests.

More precisely stated, then, the question is: Why in the fourth quarter of the twentieth century should this Court reject the wisdom of history and discover in the Fourth Amendment a requirement that an officer must have an arrest warrant before he may arrest a felon in a dwelling? The Court is asked to consider this question in the context of two cases which provide focus for the relevant issues. First, in both cases the arrests were made in the daytime. The Court need not consider special problems raised by nighttime entries. *See Jones* v. *United States,* 357 U.S. 493, 499-500 (1958). Second, both arrests were for serious, armed felonies—murder in *Payton* and armed robbery in *Riddick.* The Court need not consider special problems that might be raised by arrests for less serious felonies. *See United States* v. *Watson,* 423 U.S. at 438 (Marshall, J., dissenting). Third, in each case the defendant was arrested in his own dwelling. The Court

need not consider special problems that might be raised by an entry into a dwelling other than that of the person to be arrested.

In Section I (A) below, we will discuss the history of the constable's authority, without an arrest warrant, to make an arrest for a felony in a dwelling.

In Section I (B) below, we will show that the long-standing acceptance of the authority is based on sound social policy. As the Court recognized in *Watson* and *Santana*, an arrest warrant requirement will severely impede the most basic function of our police—arresting felons and bringing them to court to answer charges. At the same time, arrest warrants will not add significant protections to those already afforded people arrested in their homes. Indeed, in several important respects, an arrest warrant requirement will decrease those protections.

In Section I (C) below, we will urge that if the Court imposes an arrest warrant requirement, it should nonetheless formulate an exception for "exigent circumstances" different from the exception ordinarily applicable when police officers seek to excuse their failure to obtain a search warrant. The definition of "exigent circumstances," we will argue, must give weight to the powerful community interest in arresting felons. Under the formulation we propose, the failure to obtain a warrant in *Payton* should be excused. The officers were engaged in an intensive and continuous investigation which led them directly to the door of someone reasonably believed to be an armed murderer. It was reasonable for them to take the next step and enter the

apartment without first obtaining an arrest warrant. If, however, the Court adopts some other definition of "exigency" then, depending on the definition chosen, a remand would be necessary in order to develop further information about whether it was practicable for the officers to obtain a warrant before they arrested Payton.

Finally, in Section II below, we will urge that, regardless of whether the officers should have obtained an arrest warrant, Payton is not entitled to the benefits of the exclusionary rule. When Detective Malfer entered Payton's apartment, he was acting under the express authority of a state statute. At the time (January, 1970), neither the detective, his fellow officers, their supervisors, nor any prosecutor could have had any serious doubt about the lawfulness of the entry. In these circumstances, it would be a disservice to the salutary purpose of the exclusionary rule to exclude the evidence found in plain view by the officers upon entry.

POINT I

When there is probable cause to believe that a person has committed murder *(Payton)* or armed robbery *(Riddick)*, the Fourth Amendment does not prohibit a police officer from arresting that person in his dwelling during the daytime without an arrest warrant.

A. The Fourth Amendment was intended to reaffirm the common law principles governing searches and arrests which, though protecting the sanctity of the home, did not require an arrest warrant before a peace officer could make an arrest for a felony in a dwelling.

The common law is the source of much of our legal heritage concerning the privacy of the home. For example, the common law developed elaborate protections limiting when a constable could enter a dwelling to search for stolen goods. Before doing so, the constable needed a warrant. This warrant, which was later to serve as the model for the search warrant required by the Fourth Amendment, had to be issued by a magistrate, based on sworn evidence which amounted to probable cause. The objects to be seized had to be particularly described. And the constable had to inventory the things seized and make a return on the warrant.

In spite of the concern about the privacy of the home—expressed in the maxim "a man's home is his castle"—the common law recognized that a civilized society has an overriding interest in ensuring that felons are arrested and brought to justice. This interest was considered much more grave than the interest in searching for stolen goods.

A home—as sanctified as it might be—could not be allowed to serve as a sanctuary for dangerous criminals. Accordingly, the law governing arrests made in dwellings was very different from that governing searches of dwellings. When the constable entered a dwelling to make an arrest for a felony, he did not need a warrant.

1. The Common Law: Peaceable Entries

As long as the entry was peaceable, the common law treated an arrest in a dwelling like an arrest made anywhere else. The common law authorities were aware that in some felony cases there might be time to obtain an arrest warrant. *See, e.g.,* 1 M. Hale, *Pleas of the Crown* 588 (first American ed. 1847) [hereinafter "Hale"]. But, in view of the danger that violent criminals might escape apprehension, the judgment was made not to require the constable to seek a court's approval of the arrest in advance. Rather, when a felony had in fact been committed, it was considered better first to establish custody of the person and then, after the arrest, to conduct judicial proceedings.

This litigation after the arrest, not the arrest warrant, was the way the common law protected those arrested. There was prompt review by a local justice of the peace, who could order immediate release. There was review by the higher courts, which could issue writs of habeas corpus. See 2 Hale 92; *Gerstein* v. *Pugh,* 420 U.S. 103, 114-116 (1975). In addition, the arrested person could sue the constable in a damage action. In such litigation, the officer had to justify the arrest by showing either (1)

that the person arrested had committed a felony, or (2) that there was "suspicion of felony," which meant that a felony had in fact been committed and that there was probable cause to believe that the person arrested had committed it. *See* 2 Hale 84-85, 92; Dalton, Country Justice (1742 ed.) 384. In short, the constable acted at the "peril" of making the required showing after the arrest. Later in the development of the common law, after the practice of issuing arrest warrants developed, *see United States* v. *Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring), an officer who arrested under a warrant instead of under his own authority could not be held liable in a damage action even if the warrant had been issued upon less than probable cause.

2. *The Common Law: Forcible Entries*

The common law treated forcible entries to arrest differently from peaceable entries. Before making a forcible entry, the officer—whether he had an arrest warrant or not—was required to state his authority and to demand admittance. Thus, the occupants had the opportunity to open the door and avoid the necessity of force. In this way, the common law tried to avoid violent intrusion in the first place and, if force became necessary, to reduce the danger that could arise if the occupants mistook the officers for criminals entering the house. If, however, those inside would not open the door, it could be broken down. The fact that a grave crime had been committed and that there was reasonable belief that a person had committed it ("suspicion of felony") was sufficient to justify forcible entry into the home.

The principle that "a man's house is his castle" did not permit the person inside to barricade himself in his house and frustrate the arrest. The notice requirement was the way in which the common law reconciled the special concern about forcible entry with the grave community interest in arresting felons. Requiring an arrest warrant was not the solution.

Thus, in the famous Year Book case from the 1400's, long before it became the practice for justices of the peace to issue arrest warrants, we find the statement that forcible entry is not permissible in connection with civil cases but is permissible "for felony, or suspicion of felony." In felony cases, forcible entry was justifiable because of the community's interest in apprehending felons: "for it is for the commonwealth to take them."* Similarly, in 1603, *Semaine's* case—a landmark in establishing the principle that "every man's house is his castle"—stated that the "privilege of house" barred forcible entry of dwellings for

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* 13 Edw. IV, 9a: "[F]or felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the commonwealth to take them." This quotation is from *Burdett* v. *Abbott*, 104 Eng. Rep. 501, 560 (1811). The Year Book case itself is not available in English, according to librarians at the law schools of New York University and Columbia University.

The practice under which local justices of the peace issued arrest warrants developed gradually during the sixteenth and seventeenth centuries. See Holdsworth, A History of English Law (1922), pp. 294-95; Potter, Historical Introduction to English Law (London: Sweet and Maxwell, 1932), pp. 209-10.

Unless otherwise indicated, in quoting from the common law authorities, citations and footnotes are omitted.

purposes of civil litigation. But, forcible entry, after notice, was permissible "for felony or suspicion of felony" because "it is for the commonwealth to apprehend felons."* Dalton, writing shortly after *Semaine's* case, stated that "it is lawful for the King's officers, by force to break open a man's house to arrest offenders being therein * * * for the apprehending of any person for treason, felony or suspicion of felony."**

* 5 Co. Rep. 91a, 77 Eng. Rep. 194, 196-97: "[F]or felony or suspicion of felony, the K[ing]'s officer may break the house to apprehend the felon, and that for two reasons: 1. For the commonwealth, for it is for the commonwealth, to apprehend felons. 2. In every felony the King has interest, and where the King has interest the writ is *non omittas propter aliquam libertatem;* and so the liberty or privilege of a house doth not hold against the King."

** Dalton's Country Justice (1742 ed.), p. 299:

"[I]n these Cases following, it is lawful for the King's Officers, by Force to break open a Man's House to arrest Offenders being therein, if the Doors shall be all shut, so as the Officer cannot otherwise enter the House, *viz.*

1. For the Apprehending of any Person for Treason, Felony or Suspicion of Felony."

Although Dalton does not here state explicitly that the entry may be made without a warrant, his meaning is clear in context. Immediately following the statement we have quoted, which deals with felonies, Dalton lists circumstances, with respect to other offenses, when forcible entry is permissible without a warrant:

"2. Where one hath dangerously wounded another, and then flying into an House the Constable or other Officer upon fresh Suit, may break open the Door, and apprehend the Offender.
So may any other Person besides the Officer.

3. Where there shall be an Affray made in an House, and the Doors shut, the Constable, *etc.* may break into the House to see the Peace kept." (p. 300).

Dalton then goes on to discuss when forcible entry, upon writs or warrants, is permissible in civil cases. In no case, however, could

(footnote continued on next page)

Even after it became common for justices of the peace to issue arrest warrants, the authority of a constable to enter forcibly without a warrant continued to be recognized side by side with his authority to enter forcibly based on a warrant. Thus, Hale—who wrote extensively on the subject of arrests in the mid-1600's—stated that a constable may enter upon a justice's warrant.* However, the constable also has "original and inherent power" with regard to arrests, 2 Hale 88. When a felony has been committed and there is probable cause to arrest, Hale stated, "the constable may break open the door, tho he have no warrant."** Similarily, in the 1700's, Blackstone wrote that

doors be broken "to execute the King's Process (upon the Body or Goods of any Person) at the Suit of any Subject." (p. 300).

Dalton then discusses the controversy about whether arrest warrants were valid at all. He notes that it was "much controverted, whether a Justice of Peace may grant a Warrant to attach Persons suspected of felony" before indictment (p. 403). But it was Dalton's position that "The Officer, upon any Warrant from a Justice, either for the Peace, or Good Behavior, or in any other Case where the King is a Party, may by Force break open a Man's House, to arrest the Offender * * *" (p. 404).

* 1 Hale 583: "by the book of 13 *E.*4. 9.*a.* [the Year Book case discussed above] a man that arrests upon suspicion of felony, may break open doors, if the party refuses upon demand to open them, and much more may it be done by the justice's warrant."

** 2 Hale 91-92: "[I]f there be a felony done, (suppose a robbery upon A.) and A suspects B. upon probable grounds to be the felon and acquaints the constable with it * * *

1. the constable may apprehend B. upon this account, * * *. [I]f the constable should not be allowd this latitude in cases of this nature, many felons would escape, and the party arrested hath no prejudice thereby, for the justice of the peace, to whom in such cases he is properly to be brought, may consider the circumstances, and possibly in some cases discharge or bail him, and upon his trial, if innocent, he will be discharged. 3. But there must be felony in fact

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when a felony has actually been committed, the constable "may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, * * *."*

Foster's writings are somewhat ambiguous. He stated that, without a warrant, an officer could not justify a forcible entry based on "bare suspicion." He does not say whether an entry without a warrant could be justified by a showing of probable cause. But he does seem to say, as subsequent authorities have interpreted him, that a warrant was not needed at least if the person inside had in fact committed a felony. In such a situation, the dwelling is "no

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done, and the constable must be ascertained of *that,* and aver it in his plea, and it is issuable.

* * *

3. * * * [I]f the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, tho he have no warrant. 13 *E.* 4. 9. *a.* [the Year Book case discussed above] for it is a proceeding for the king by persons by law authorized and therefore there is virtually a ***non omittas*** in the actings of their authority" (emphasis in original).

The editorial footnote to the first American edition of Hale's work states that, in view of Hale's reasoning and his other statements on the subject in 1 Hale 583 (quoted above at p. 31, first footnote), the use of the words "if the supposed offender fly and take house" should not be taken to mean—and were not taken to mean by a later authority, Sir William Russell—that Hale considered forcible entry to be permissible only when there was immediate pursuit. 2 Hale 92, n.12.

* 4 Blackstone's Commentaries (Andrews ed.) 292:

"The constable * * * hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace. And in case of felony *actually* committed, or a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken;" (emphasis in original).

sanctuary" for him; doors may in such a case be forced.* Thus, East, writing after Foster, clarifies Foster's statements by repeating his language and then adding that entry without a warrant "will at least be at the peril of proving that the party so taken on suspicion was guilty." 1 East, Pleas of the Crown, p. 322 (1806 Phila. ed.). See also 1 Russell on Crimes (1819), p. 745. East concludes his discussion of the subject by stating, "according to Lord Hale, if there be a charge of felony laid before the constable, and reasonable ground of suspicion thereon * * * the constable or his watch may break open doors * * *." (*Id.*).**

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* M. Foster, Crown Law (3rd ed. 1792) pp. 320-321: "Where a felony has been committed or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced, the notification, demand, and refusal before mentioned having been previously made.

"In these cases the jealousy with which the law watcheth over the publick tranquility, (a laudable jealousy it is,) the principles of political justice, I mean the justice which is due to the community, ***ne maleficia remaneant impunita,*** all conspire to supersede every pretence of private inconvenience; and oblige us to regard the dwellings of malefactors, when shut against the demands of publick justice, as no better than the dens of thieves and murderers, and to treat them accordingly.

"But bare suspicion touching the guilt of the party will not warrant proceeding to this extremity, though a felony hath been actually committed; unless the officer cometh armed with a warrant from a magistrate grounded on such suspicion."

** Appellants' Brief, at p. 47, makes much of East's statement that an officer must be in "fresh pursuit" before he may, without a warrant, forcibly enter a dwelling in order to re-take a person who has previously been lawfully arrested and then escaped. 1 East 324. However, East was not writing here about felony cases but about cases of escape—no matter how petty the offense for which the original arrest had been made. The common law authorities treated such "re-taking" cases as a separate category with rules of its own. See, e.g., 1 J. Chitty, Criminal Law (3rd Amer., from 2d London, ed. 1836) 57; 2 Hawkins, Pleas of the Crown (6th ed. 1788), c. 14 sec. 9, p. 138. When the New York Code of Criminal Procedure codified the common law rules of arrest in 1881, special provision continued to be made for such cases. Sec. 187 provided for forcible entry "to retake the person escaping * * *."

Burn (who, like Foster, wrote in the 1700's) stated that a constable may break open doors not only with a warrant, but without a warrant "upon reasonable cause suspected."* Similarly, Chitty, writing in the early 1800's about the body of law which had developed, stated, "A constable may break open doors to take a felon * * * where a felony has in fact been committed by someone, and there be reasonable ground to suspect that a person be the offender."**

* 1 R. Burn, Justice of the Peace (1755 ed.) 71. Burn agreed with Hale that a constable could forcibly enter to arrest without a warrant, and a private person could do so as well, though on more limited grounds than an officer: "[I]t seems that he that arrests as a *private* man, barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril; that is, if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. 1 H.H. [Hale] 82.

"But a *constable* in such case may justify * * * 2 H.H. [Hale] 92." [quoted above at p. 32, footnote]. 1 Burn 71 (emphasis in original).

Burn prefaced his discussion of forcible entry with or without a warrant by stating, "as to the case of breaking open doors, in order to apprehend offenders, it is to be observed that the law doth never allow of such extremities but in cases of necessity; and therefore no one can justify breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance." 1 Burn 71.

** 1 J. Chitty, Criminal Law (3rd Amer., from 2d London, ed. 1836) 22-23: "A constable may break open doors to take a felon, if he be in the house, and entry denied after demand, and notice given that he is a constable. * * * So, where a felony has been committed by some one, and there be reasonable ground to suspect that a person be the offender, a constable has a similar power of breaking open doors to apprehend him.

Chitty discussed the earlier authorities and concluded, as Burn had, that a private person may justify forcible entry without a warrant by proving "the actual guilt of the party arrested" and that "reasonable ground of suspicion" will not suffice. But an officer is excused when he is "acting bona fide on the positive charge of another." (1 Chitty 53. *See* first footnote, *supra*, and 1 Burn, Justice of the Peace [1869 ed.] 303; see also p. 301 and Vol. 5, pp. 1134, 1135.) Chitty and the later editions of Burn add the caution

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These common law authorities, who rejected an arrest warrant requirement, developed the protections upon which the modern law of arrest is based. They (1) developed the concept of probable cause as the basis for arrest, whether in a dwelling or elsewhere,* (2) provided for prompt review of arrests by the courts, (3) developed the notice requirement for forcible entry,** (4) limited the role of private persons in making arrests, (5) recognized the validity of arrest warrants which are based upon probable cause and which name or describe the person to be arrested, and (6) imposed an arrest warrant requirement for most crimes but not for felonies. The modern law of searches is based on the protections which these same common law authorities developed: a warrant, issued by a magistrate, upon sworn evidence that amounts to probable cause, particularly describing the place to be searched and

that "the breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." 1 Chitty 53; 1 Burn (1869 ed.) 303.

* *See Samuel* v. *Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (1780); *Beckwith* v. *Philby*, 108 Eng. Rep. 585, 586 (1827); *Davis* v. *Russell*, 5 Bing. 354, 130 Eng. Rep. 1098, 1101-1102 (1829). See also 4 Stephen's New Commentaries (2d ed. 1848) 388 ("upon a reasonable charge of treason or felony, or of a dangerous wounding, whereby felony is likely to ensue, or upon his own reasonable suspicion that any of such offenses have been committed, he may without warrant arrest the party so charged or suspected, and he will be justified in doing so though it should afterwards turn out that the party is innocent, or even that no such offense has been in fact committed. He is also authorized in these cases, as well as upon a justice's warrant, to break open doors.")

** As the common law developed, the degree of "force" which was considered necessary to bring the notice requirement into play was reduced until today the requirement applies when there is no more force than the turning of a doorknob. *Sabbath* v. *United States*, 391 U.S. 585, 590 (1968). It is the unannounced intrusion which is the primary consideration and which the notice requirement directly confronts.

things to be seized, and requiring an inventory and return. *See Entick* v. *Carrington,* 19 Howell's State Trials 1029, 1066-67 (1765).

There were other common law authorities, like Coke, who disagreed with these developments. But, Coke does not aid appellants' position. He was not a partisan of warrants. On the contrary, he rejected the validity of both arrest warrants and search warrants issued by local justices of the peace. He did not recognize the authority of a constable (before indictment) to make arrests except in his capacity as a private person. In his capacity as a constable, he could make an arrest only upon what Coke called a "writ," which was not an arrest warrant issued by a local magistrate but was process issued after indictment. See 4 Inst. 176-78. In fact, Coke rejected most of what was to become accepted law and practice. *Compare* 2 Hale 107-10, 112-14.

But, although Coke disagreed with most of the common law developments, he agreed that, in felony cases, prior judicial approval was not needed before a dwelling could be forcibly entered to make an arrest. Coke preferred the practice of earlier times when most arrests were made by private persons who justified their arrests on the basis of first-hand knowledge that the person arrested had committed the crime. *See United States* v. *Watson,* 423 U.S. at 429 (Powell, J., concurring). Therefore, Coke regarded forcible entry as justified not by an arrest warrant, but by a showing that the person arrested had actually committed the felony, see 2 Hale 90. Similarly, Hawkins, who also believed that a constable had no greater authority to arrest than a private person (2 Hawkins, Pleas of the Crown, c.

13, sec. 7, p. 130 [6th ed. 1788]), stated that forcible entry was proper to arrest a "known" felon "with or without a warrant by a constable or private person."*

3. The Events Which Led to the Adoption of the Fourth Amendment

One of the reasons some common law authorities distrusted arrest warrants was that local justices of the peace might issue them without any basis, i.e., on "bare surmises." Coke. 4 Inst. 178. Arrest warrants abused in this manner deprived the person arrested of his remedy against an officer who made an arrest which was based on less than probable cause. In addition, arrest warrants could be general. And, as Hawkins wrote, the general warrant "might have the effect of an hundred blank warrants" (2 Hawkins, c. 13, sec. 10, p. 132), leaving it to the officer to arrest whomever he chose without any basis whatsoever.

The ability of the warrant, particularly the general warrant, to shield officials from accountability presaged

* 2 Hawkins, Pleas of the Crown (6th ed. 1788), c. 14, pp. 138-139: "where a person authorised to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify breaking open the doors in the following instances:

* * *

Fifthly, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person. But where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day, that no one can justify the breaking open doors in order to apprehend him." Hawkins use of the word "pursued" here does not mean that he considered immediate pursuit to be required for forcible entry in felony cases. When Hawkins meant immediate pursuit, he said precisely that, for example, in his next instance of when doors may be broken: "where those who have made an affray in his presence fly to a house, and are *immediately pursued* by him [the constable]." 2 Hawkins 139 (emphasis added).

developments which led to the Revolution and to the Fourth Amendment. By the 1760's, general warrants, for both search and arrest, were being used in England and the colonies to enforce extensive economic and social programs. Under general search warrants known as "Writs of Assistance," customs and excise officials searched houses, shops and other places for prohibited or uncustomed goods. These writs did not specify the places to be searched or the objects to be seized, required no inventory or return, and were of indefinite duration. In effect, as Otis was to say, these "monsters in the law" lived forever and granted customs and excise officials carte blanche to search anywhere for anything. They did not, however, authorize these officials to make arrests. See Lasson, The History and Development of the Fourth Amendment (1937) [hereinafter "Lasson"], pp. 28-29, 33-34, 37-42, 51-56.

General warrants were also used to enforce regulation of businesses, especially printing. Efforts to control the press led to a Star Chamber decree of 1566 which conferred upon agents of the Stationers' Company broad powers of search, seizure, and arrest as well. Later, executive officials known as "messengers" were issued general warrants to search for prohibited books and papers. Although the legislation authorizing this practice lapsed in 1695, Secretaries of State continued to issue these general warrants in cases of what was termed "seditious libel." See Lasson, pp. 23-28, 31-34, 37-38, 42-43; *Marcus* v. *Search Warrants*, 367 U.S. 717, 724-27 (1961).

These abuses, and the great challenges to them, had nothing to do with the common law authority of a constable

to enter a dwelling to arrest a felon. James Otis, Patrick Henry, William Pitt, and the judges who made the great decisions of the 1760's were condemning something quite different—the vast power of numerous officials to enter every house and every business without proper restraints set by law and without accountability.

Otis condemned the "Writs of Assistance" and gave as an example of its awesome power a Boston customs official who appeared in court to answer for some minor offense. With the power granted by the writ, the customs official told the judge, "I will show you a little of my power," and then searched from top to bottom the homes of the judge and also the constable who had called him into court.* As Otis said, under the Writs of Assistance, customs house officers were beyond the law: "[W]hether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. * * * [N]o one can be called to account."**

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* This example is given by Otis in his argument in the "Writ of Assistance" case, see 2 Legal Papers of John Adams (Wroth and Zobel ed. 1965) 143.

** 2 Legal Papers of John Adams 142-43: "Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. * * * Again these writs ARE NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in the law live forever, no one can be called to account. Thus reason and the constitution are both against this writ."

Patrick Henry condemned the power of officials to "go into your cellars and rooms, and search, ransack, and measure everything you eat, drink or wear." He said that officials "ought to be restrained within proper bounds."*

William Pitt condemned the power of officials to enter every home in the English cider regions in order to search for violations of the excise laws. See Lasson, pp. 41-42. He called it a "dangerous precedent" to admit "the officers of excise into private houses". And he reportedly also said, "The poorest man may in his cottage bid defiance to all the forces of the Crown * * *" (quoted in *Miller* v. *United States,* 357 U.S. 301, 357 and n.7 (1958)).

In the great cases of the 1760's, the courts condemned the power of officials to ransack a man's house for hours under a general warrant, going through his "secret cabinets and bureaus" and carrying off his personal papers, whether "libellous" or not, to a clerk for the Secretary of State. *See Entick* v. *Carrington,* 19 Howell's State Trials 1030, 1063-65 (1765). As Lord Camden stated, "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour;" *Huckle* v. *Money,* 95 Eng. Rep. 768, 769 (1765), *See also Wilkes* v. *Wood,* 98 Eng. Rep. 489, 498 (1763).

* 3 Elliot's Debates on the Federal Constitution (1836 ed.) 448-49: "The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds."

In short, these great leaders were condemning a power which, as Otis said, "if it should be declared legal, would totally annihilate" the principle that "a man's house is his castle." In condemning these broad and vicious powers, however, they were not also condemning the common law authority of the constable, with or without a warrant, to enter a dwelling in order to arrest a felon. In fact, the structure developed by the common law—both the law of arrests and the law of searches—was a source of inspiration to them. It was the common law which had developed their guiding principle that "a man's house is his castle." In recognizing the right to be secure against "unreasonable searches and seizures" and in prohibiting general warrants, the Fourth Amendment was intended to reaffirm traditional common law limitations on searches and arrests.

Thus, when our forefathers condemned the general search warrant, their model for limiting the power to search was the common law warrant for stolen goods. *See, e.g.,* Otis' argument against the "Writ of Assistance" (quoted above at p. 39, second footnote). *Entick* v. *Carrington,* 19 Howell's State Trials at 1066-67. *Wilkes* v. *Wood,* 98 Eng. Rep. at 498. *See also Marcus* v. *Search Warrant,* 367 U.S. 717, 727 (1961). Similarly, the general arrest warrant was condemned because it unleashed the power of arrest from the moorings developed by the common law. Under these general arrest warrants, whom to arrest was "left to the discretion of the officer." *Leach* v. *Three of the King's Messengers,* 19 Howell's State Trials 1001, 97 Eng. Rep. 1075, 1088 (1765). The officer was free to enter a dwelling to make an arrest, with little or no basis; and no matter how scanty his basis, he could not be

held accountable in an action for damages. See *Entick* v. *Carrington,* 19 Howell's State Trials at 1059, *Leach* v. *Three of the King's Messengers,* 97 Eng. Rep. at 1088. Under the protective principles of the common law, however, the constable could make an arrest in a dwelling; but he could be held liable if he did not have probable cause to believe the person he arrested had committed the felony. Alternatively, the constable could make the arrest under an arrest warrant, which would shield him from liability. But, the warrant was not to be issued except upon probable cause and with "directions" from the magistrate naming or describing the person to be arrested. *Leach* v. *Three of the King's Messengers,* 97 Eng. Rep. at 1088.

4. *Acceptance of Common Law Principles in this Country*

In view of this history, it is not surprising that the law of arrest at common law, as set down by such authorities as Hale and Blackstone, became the law of arrest in this country. American peace officers, both state and federal, had the same authority to arrest as their common law predecessors.* They could make arrests with and without

* United States marshals and their deputies had "the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states." (Act of May 2, 1792, c. 28, §9, 1 Stat. 265; quoted in *United States* v. *Watson,* 423 U.S. at 420, and see 421 n.9, collecting subsequent reenactments.) A sheriff in New York was "*ex officio,* a conservator of the peace" and had the authority to arrest without a warrant. *Coyles* v. *Hurtin,* 10 Johns. Rep. 84, 86 (N.Y. Sup. Ct. 1813) (per Kent, Ch. J.). A constable had similar authority. *See Taylor* v. *Strong,* 3 Wend. 384, 385-386 (N.Y. Sup. Ct. 1829). Police officers in the metropolitan New York area possessed "all the common law and statutory powers of constables except for the service of civil process." L. 1857, c. 569, Sec. 8. *See Burns* v. *Erben,* 40 N.Y. 453, 467 (1869). *See also Shanley* v. *Wells,* 71 Ill. 78, 81 (1873) (equating the authority of an Illinois peace officer with that of an English constable at common law).

warrants in felony cases. For less serious crimes, they generally needed warrants except when the offense was committed in the officer's presence. They could enter dwellings peaceably to effect arrests. And they could enter forcibly as long as they first knocked and announced their authority in order to give the occupant an opportunity to permit peaceable entry.

In the century following the Revolution, there was considerable litigation concerning arrests made without warrants. In deciding those cases, the courts found the governing principles in the English common law authorities.*

* *See, e.g. Holley* v. *Mix,* 3 Wend. 350, 353-54 (N.Y. Sup. Ct. 1829) (discussing Chitty and other English common law authorities, and holding that arrest for a felony is proper without a warrant "whether there is time to obtain one or not."). See also the note following the report of this case in 20 Am. Dec., pp. 705-706, and cases cited therein. See also *Coyles* v. *Hurtin,* 10 Johns. Rep. 84, 86 (N.Y. Sup. Ct. 1813) (reversing a jury verdict against a sheriff who had arrested the plaintiff without a warrant for aiding an escape). *Taylor* v. *Strong,* 3 Wend. 384, 385-386 (N.Y. Sup. Ct. 1829) (citing Hale and other English common law authorities concerning the authority of a constable to arrest without a warrant for breach of the peace committed in his presence). *Hawley* v. *Butler,* 54 Barb. 490, 495-96 (N.Y. Sup. Ct. 1868) (quoting at length from Hale concerning the common law authority of officers to arrest without a warrant in felony cases).

As in England, the common law rules were broadened by removing the requirement that a felony was in fact committed, so that an officer could arrest without a warrant upon reasonable belief that a felony had been committed.) *See, e.g., Reuck* v. *McGregor,* 32 N.J.L. 70, 74 (N.J. Sup. Ct. 1866) ("a peace officer may justify an arrest upon a reasonable charge of felony, although it should turn out that no felony had been committed"). *Doering* v. *State,* 49 Ind. 56, 19 Am. Rep. 669, 670-671 (1874) (quoting from *Holley* v. *Mix, supra*). *See also Eanes* v. *State, 6 Humpreys* 53, 44 Am. Dec. 289, 290-91 (Tenn. 1845), and the note following the report of this case in 44 Am. Dec. at p. 292. *See also Barnard* v. *Bartlett,* 64 Mass. 501, 57 Am. Dec. 123 (1852), *Commonwealth* v. *Irwin,* 83 Mass. 587 (1861), and *Commonwealth* v. *Reynolds,* 120 Mass. 190, 21 Am. Rep. 510 (1876) (broadening the common law rule by permitting forcible entry under a warrant upon reasonable belief that the person to be arrested is inside.).

For example, constitutional claims were made that a peace officer should be required to obtain an arrest warrant unless he could prove that there was no time to get one. Those claims were rejected on the basis of the long common law history and for the same reasons the common law authorities found persuasive: "The public safety, and the due apprehension of criminals, charged with heinous offenses, imperiously require that such arrests should be made without warrant by officers of the law." Whether the officer had the time to obtain an arrest warrant is for the officer to consider "under his official responsibility, and [is] not a question to be reviewed elsewhere." *Rohan* v. *Sawin,* 59 Mass. 281, 285, 286 (1851).*

Once it was settled that a peace officer could arrest without a warrant, the authority at issue here—to make an arrest for a felony in a dwelling without a warrant—was so well settled that there was not one direct constitutional attack on it in the nineteenth century. There were, however, several discussions of this authority in cases considering related issues. These discussions stated what appeared to be obvious—that peace officers had such authority.

In a very early case, *Kelsy* v. *Wright,* 1 Root's Conn. Rpts. 83, 84 (1783), an entry was made under a warrant. In stating that the entry was lawful, the court did not men-

* *See also Wakely* v. *Hart,* 6 Binn. 316, 319 (Pa. 1814) (the rules permitting arrest without a warrant are "principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed was nothing more than an affirmance of the common law * * *."). *North* v. *People,* 28 N.E. 2d 966, 972 (Ill. 1891) (the warrant clause "does not abridge the right to arrest without warrant in cases where such arrest could be lawfully made at common law before the adoption of the present constitution.").

tion the warrant but said that the officer "was lawful constable and had right to break open the door and enter said house * * *." *See also State* v. *Smith,* 1 N.H. 346, 346-47 (1818). In *McLennon* v. *Richardson,* 81 Mass. 74, 77 Am. Dec. 353, 354 (1860), the court, citing the English common law authorities, recognized the authority of a constable to break open doors and arrest without a warrant in "cases where treason or felony has been committed * * *." Such cases are of a "class which requires the immediate intervention of legal authority, on account of the grave nature of the offense * * *." In *Shanley* v. *Wells,* 71 Ill. 78, 82 (1873), the court quoted Blackstone for the proposition that, when a felony has actually been committed, the constable may "upon probable suspicion, arrest the felon, and, for that purpose, is authorized (as upon a justice's warrant) to break open doors * * *." In *Rohan* v. *Sawin, supra,* the court discussed and approved an English case which upheld the lawfulness of entry of a dwelling, without a warrant, to arrest for a felony. 59 Mass. at 285-86. In *Wade* v. *Chafee,* 8 R.I. 224, 5 Am. Rep. 572, 57? (1865), the court relied upon the same English case in upholding the authority of a police officer to arrest without a warrant whether or not there was time to obtain one.*

* The nineteenth century treatises which appellants cite (Br. at 50-53) do not state that an arrest warrant is required for forcible entry in felony cases. Barbour agrees with Chitty (quoted at p. 34, 2d fn., *supra*) that an officer, and a private person as well, may forcibly enter without a warrant in order to arrest for a felony. O. Barbour, A Treatise on the Criminal Law (3rd ed. 1883) 548. (Appellants quote Barbour's statement that it would be "prudent" for the officer the obtain a warrant. This statement was made with respect to the offense of breach of the peace or an "affray." *Id.,* p. 546.) Bishop, as appellants recognize, agreed that no warrant is required in felony cases. 1 J. Bishop, Criminal Procedure (3rd ed. 1880) 109. Heard does not state that a warrant is required but repeats Foster's

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In the latter part of the nineteenth century, the obvious became concrete. There developed a widespread movement to codify the common law. This movement led not to "legislation" as we think of it now, but to civil and criminal codes which "assembled" this law "so as to render it conveniently accessible."* The law of arrest was "assembled" into numerous state statutes which recognized the authority of peace officers, without warrants, to enter dwellings in order to arrest felons. By 1930, 24 of 29 states which had enacted statutes on the subject authorized forcible entry by an officer without a warrant; five states had statutes providing for forcible entry under a warrant.** As of 1975, 30 of the 36 states with statutes

statements, discussed at p. 33, *supra*. F. Heard, A Treatise Adapted to the Law and Practice of the Superior Courts * * * in Criminal Court 148 (1879). Russell and Colby do not require a warrant but say that when the officer arrests without a warrant he may justify the arrest by showing that the person arrested committed a felony. 1 Russell on Crimes (1819) 745. 1 J. Colby, A Practical Treatise on the Criminal Law of the State of New York 74 (1868). *Randall's Case*, 5 City Hall Record 141 (N.Y. Ct. of Oyer and Terminer 1820) concerned an arrest for "dangerous wounding," which the common law authorities treated as a category separate from felony arrests. *See, e.g.*, Dalton, Country Justice (1742 ed.), p. 299 [quoted at p. 30, 2d fn., *supra*].

* "Historical Note," N.Y. Code of Criminal Procedure (McKinney's ed. 1958), pp. 341, 347, which refers to the report made by Commissioners Field, Loomis and Graham in 1849, proposing a code of criminal procedure.

** See American Law Institute, Code of Criminal Procedure (1930), Commentary at 254-55. The New York Code of Criminal Procedure as enacted in 1881 provided for arrest and forcible entry without a warrant "when the person arrested has committed a felony" (Sec. 177(2)) and "when a felony has in fact been committed, and he [a peace officer] has reasonable cause for believing the person to be arrested to have committed it." (Sec. 177(3)). In 1958, the Code was amended to permit a peace officer to arrest without a warrant upon probable cause "though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it" (Sec. 177(4)). L. 1958, c. 707, Sec. 1. See N.Y. Code of Criminal Procedure (McKinney's ed.), Pkt. Pt., p. 111.

on the subject had such a provision.* For some categories of federal officers, acting in states which had a rule permitting forcible entry without a warrant, Congress has repeatedly adopted the rule by reference. *See United States* v. *Watson*, 423 U.S. at 420-421 and n.9. Other categories of federal officers, in the absence of federal statutory provisions, have been left by Congress to be governed by the law of the state where an arrest without warrant takes place. *See United States* v. *Watson, supra*, 423 U.S. at 420-21, n.8.

The first direct attack on this authority came in the early part of the twentieth century. The Court in *Phelps* rejected the attack and took the authority to be "settled." *Commonwealth* v. *Phelps*, 209 Mass. 396, 95 N.E. 868, 873 (1911). This view was accepted for much of the rest of this century. Major scholars such as Wilgus and Perkins believed that peace officers had such authority.** The

* See American Law Institute, Model Code of Pre-Arraignment Procedure (1975), Appendix XI (collecting state statutes concerning forcible entry). See also Blakey, The Rule of Announcement and Unlawful Entry, 112 U. Pa. L. Rev. 499 (1964), Appendix A (listing 30 states with statutes authorizing forcible entry without a warrant). *See also United States* v. *Watson, supra*, 423 U.S. at 418, n.6.

** Wilgus stated that "the officer, if necessary, may break doors in arresting one who has committed a felony, or one who he has reasonable grounds to believe has committed a felony, whether a felony has or has not been committed * * *." Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 803 (1924).

Referring to forcible entry under a warrant, Wilgus wrote, "Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased." (p. 802). Wilgus then stated that "much the same rules apply when arrests

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American Law Institute in 1930, and again in 1975, wrote the authority into its model legislation. ALI, Code of Criminal Procedure (1930), Secs. 21, 28. ALI, Model Code of Pre-Arraignment Procedure (1975), Sec. 120.6(1).*

As far as we aware, until this Court's dictum in *Coolidge* v. *New Hampshire,* 403 U.S. 433, 480 (1971), only one jurisdiction considered the authority at issue here to be unconstitutional. In the case which reached this conclusion, *Accarino* v. *United States,* 179 F.2d 456 (D.C. Cir. 1949), it was unnecessary for the court to decide the point and the opinion misconstrued the common law history. In any event, both before and after *Accarino,* this Court accepted (though without directly deciding) the validity of a police officer's authority to enter a dwelling without a warrant in order to arrest for a felony. In *Johnson* v. *United States,* 333 U.S. 10 (1948), Justice Jackson was emphatic and eloquent about the need for a neutral magistrate to review probable cause before the police could conduct a search. 333 U.S. at 14-15. In that same opinion, he stated that the officers could have entered the hotel room in question without a warrant in order to make an arrest

are made without a warrant, provided the one making the arrest is acting within his lawful right to arrest." (p. 802).

Perkins wrote "As to breaking open doors or windows, assuming this to be necessary to reach the place where the person to be arrested is, or is reasonably supposed to be * * *, the common-law rule is [that] * * * an officer seeking to make an arrest for any crime, either in obedience to a warrant or under lawful authority to arrest without a warrant, may break the doors or windows even of a dwelling house." Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 245 (1940).

* Under Section 120.6(3), entries during the nighttime, defined as the hours between 10 p.m. and 7 a.m., are permissible only under a warrant or when certain special circumstances are reasonably believed to be present.

"for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." 333 U.S. at 15 (footnote omitted). In *Jones* v. *United States,* 357 U.S. 493, 499-500 (1958), the Court noted, without deciding, the "grave constitutional question" concerning forcible nighttime entries without a warrant but expressed no concern about daytime entries. In *Ker* v. *California,* 374 U.S. 23, 38 (1963), four Justices adopted the rule stated by Wilgus that a dwelling may be forcibly entered without a warrant after notice of purpose and authority is given. Justice Harlan, concurring in the result, did not question this rule. And the dissenters did not question the rule either. They contended only that the officers had not adequately announced their authority and purpose, see 374 U.S. at 47-50 (Brennan, J., dissenting in part). In *Sabbath* v. *United States,* 391 U.S. 585, 588 (1968), the Court stated that the validity of a forcible entry to arrest "without a warrant" is governed by the notice requirement set forth in the federal statute concerning execution of search warrants.

B. The long-standing and widespread acceptance of the constable's authority, without a warrant, to arrest a felon in his dwelling is based on sound social policy.

Throughout our history, it has been recognized that searching dwellings for things and arresting felons in dwellings implicate very different policies and interests. In the centuries before the ratification of the Fourth Amendment, our English ancestors thought it unwise to compel a constable to get an arrest warrant prior to arresting a felon in his dwelling. The Fourth Amendment was intended to reaffirm those common law principles. Following that amendment's adoption, we have lived so satisfactorily without an arrest warrant requirement that, until the past few years, virtually no one suggested changing the traditional law. The question presented here, therefore, is whether in 1979 this Court should reject Justice Holmes' admonition ["a page of history is worth a volume of logic", *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921)], invent an arrest warrant requirement, and impose it on the 50 states and on the federal jurisdictions.

United States v. *Watson,* 423 U.S. 411 (1976), and *United States* v. *Santana,* 427 U.S. 38 (1976), decided only three years ago, go a long way toward answering that question in the negative. In those cases, the Court declined to require arrest warrants even though an arrest amounts to a total loss of a person's liberty. Appellants attempt to dismiss these decisions as instances of blind adherence to history. But *Watson* and *Santana* cannot be so easily discarded. The Court deferred to history because it embodied wisdom and experience as relevant in 1976 as in

centuries past: The "balance struck by the common law," 423 U.S. at 421, was still a sensible accommodation among the competing personal and community interests at stake when officers arrest felons.

Of course, the cases now before the Court differ in one respect from *Watson* and *Santana.* In *Watson,* the police arrested the defendant in a restaurant. In *Santana,* after seeing the defendant in the doorway of her home, the officers followed her inside and arrested her there. In *Payton* and *Riddick,* the officers entered to make the arrest without first seeing the defendant outside. The similarities among the cases—in each, the police were arresting for a felony—are much more important than any differences.

1. An arrest warrant requirement will severely interfere with the most basic function of our police—arresting the felon and bringing him before the court to answer charges.

Law enforcement functions are varied, and the community's legitimate interests in these several functions differ in intensity. For example, society may have a strong interest in finding evidence helpful at a trial. That interest pales, however, beside the law enforcement interests at stake in *Watson, Santana,* and the cases now before the Court: the need to catch criminals like Payton and Riddick —both accused of armed felonies—as quickly as possible, in order to bring them to court.

As much as in *Watson* and *Santana,* imposing an arrest warrant requirement in these cases will interfere with this most basic law enforcement function. The requirement will

effect many serious cases. It will pressure police to seek warrants and make arrests too hurriedly. It will increase the likelihood of arresting innocent people. By diverting scarce resources, it will interfere with the police's ability, especially in complicated cases, to do the thorough investigation necessary for the apprehension of the guilty person. During the crucial hours before the arrest, it will penalize the police for deliberate planning. It will, as a direct consequence, lead to more injuries—to police, to defendants and to bystanders.

In 1977, there were in New York City alone 115,121 felony arrests. NEW YORK CITY POLICE DEPARTMENT CRIME COMPARISON REPORT 113 (1977). That year in the United States there were over 17,000 arrests for murder, 25,000 arrests for forcible rape and 122,000 arrests for robbery. F.B.I. UNIFORM CRIME REPORTS 180 (1977). We do not know how many of these arrests were in dwellings. However, the number of arrests in dwellings does not indicate how many cases will be affected by an arrest warrant requirement. The police do not know whether the felon will be found in a dwelling or elsewhere. Consequently, some police officers, exercising caution, may seek an arrest warrant when they do not arrest the felon immediately after the crime. Cases in which the police find the defendant more than two hours after the crime comprise about one-half of felony arrests in urban centers. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 96 (1967).

Even if an arrest warrant requirement affects only those cases in which arrests are ultimately made in the dwelling,

those will certainly be the most serious cases. Arresting a felon in a dwelling is dangerous. NEW YORK STATE POLICE MANUAL 81, 83 (3d ed. 1971) (hereinafter "POLICE MANUAL"). Police will not want to make such an arrest except in grave matters and when absolutely necessary. Since the Indiana Supreme Court adopted an arrest warrant requirement, there have been six reported cases in which that court considered the warrantless arrest of a felon in a dwelling. Three cases involved murder, one involved armed robbery, and one involved kidnapping.* Since the Massachusetts Supreme Judicial Court adopted such a requirement, four reported cases in that court have dealt with warrantless arrests in residences. Two involved murders, and two involved armed robberies.** It is not accidental, then, that the cases now before the Court involve arrests for murder and armed robbery, and not for perjury or embezzlement.

Investigations into serious cases like murder and armed robbery come in an almost infinite variety. Some (like in *Payton*) are fast-breaking—leading from one piece of information to the next and ultimately to the defendant. Others (perhaps like in *Riddick*) are slower—filled with

* *Pawloski* v. *State*, —— Ind. ——, 380 N.E. 2d 1230 (1978) (murder); *Crune* v. *State*, —— Ind. ——, 380 N.E. 2d 89 (1978) (murder); *Barnes* v. *State*, —— Ind. ——, 378 N.E. 2d 839 (1978) (armed robbery); *Banks* v. *State*, 265 Ind. 71, 351 N.E. 2d 4, *cert. denied*, 429 U.S. 1077 (1977) (murder); *Finch* v. *State*, 264 Ind. 48, 338 N.E. 2d 629 (1975) (kidnapping); *Ludlow* v. *State*, 262 Ind. 266, 314 N.E. 2d 750 (1974) (narcotics).

** *Commonwealth* v. *Boswell*, —— Mass. ——, 372 N.E. 2d 237 (1978) (armed robbery); *Commonwealth* v. *LeBlanc*, —— Mass. ——, 367 N.E. 2d 846 (1977) (murder); *Commonwealth* v. *Walker*, —— Mass. ——, 350 N.E. 2d 678, *cert. denied*, 429 U.S. 943 (1976) (murder); *Commonwealth* v. *Moran*, —— Mass. ——, 345 N.E. 2d 380 (1976) (armed robbery).

false starts, winding alleys leading nowhere, periods when no useful information is developed, and other periods when information seems to flow in all at once. Sometimes information comes from responsible citizens or victims of crime (as in *Riddick*); sometimes from criminals (as in *Payton*), alcoholics or drug addicts. Sometimes information comes from documents; sometimes from "street talk." Sometimes the police may be led to useful information by hunches; sometimes by scientific experiment. Sometimes the police will canvass entire neighborhoods; sometimes a witness will simply walk into the stationhouse.

An arrest warrant requirement will operate in this uncertain world of the streets and not in the calm of the courtroom. Before such a requirement is established and imposed on the thousands of police departments throughout the country, its operation should be seen from the perspective of the policeman on the street. It is this officer who will have to shift the focus of his investigation to accommodate any new requirement. We cannot predict how many investigations will be hampered or destroyed. But we believe the number will be substantial. We further believe that the Court will not be able to set guidelines which exclude from the requirement those felony cases in which investigations will be destroyed.

The officer on the street will have to take the new requirement very seriously. If the Fourth Amendment commands that he get an arrest warrant, and he fails to do so, he may face tort suits, civil rights actions, or disciplinary proceedings. He certainly will face the possibility that the felon will be freed because of the suppression of important evidence—the murder weapon, the suspect's admissions

made upon arrest, or the testimony of a witness that he identified the suspect at a post-arrest lineup. *See Crews* v. *United States,* 389 A. 2d 277 (D.C.) (en banc), *cert. granted,* —— U.S. —— (February 21, 1979). In some places, the officer who fails to obtain a warrant will risk a ruling that the court has no personal jurisdiction to try the defendant. *Laasch* v. *State,* 84 Wis. 2d 587, 267 N.W. 2d 278 (1978).

These risks will lead police officers to get the warrant as soon as possible. If he does not, and unforeseen circumstances then require an immediate arrest, the officer risks a ruling, years later in the calm of a courtroom, that the new circumstances will be said to have been "foreseeable" (or indeed "created" by the officer himself). As a result, the evidence will be suppressed because the officer should have obtained a warrant sooner. *See United States* v. *Santana,* 427 U.S. at 48 (Marshall, J., dissenting); *United States* v. *Watson,* 423 U.S. at 450 (Marshall, J., dissenting).

The rush to get the arrest warrant will lead to significant problems. The police will be required "to guess at their peril the precise moment at which they have probable cause to arrest a suspect." *Hoffa* v. *United States,* 385 U.S. 293, 310 (1966). In some cases, the police will make a bad guess and will seek a warrant too soon—that is, before they have probable cause. If the magistrate refuses to sign the warrant, then the police will have taken time from their investigation. If the magistrate, deferring to the public need to seize possible felons, does sign, then any evidence discovered incident to the arrest will be suppressed.

In other cases the police will have probable cause when they seek the warrant. But having probable cause does not necessarily mean that the officers have focused on the guilty person. If the police are pressured to obtain a warrant too quickly, the likelihood of their arresting innocent people will increase. The trauma for the innocent person, wherever arrested, cannot be quantified. In addition, the issuance of the arrest warrant will have interfered with the police's ability to find the right person. At a time when they could, and should, be investigating further, they will have to shift their focus to obeying the command of the warrant—that is, that they find and arrest the person named, book him and bring him to court. All this time, the trail to the real culprit will be getting cold.

Even if, based on probable cause, the police obtain a warrant for the right person, and even if the police continue to gather evidence in order to prove his guilt at trial, the issuance of the warrant will seriously interfere with the on-going investigation. Every new piece of information will have to be brought to the magistrate's attention. If the police develop facts which cast doubt on whether the person named in the warrant is guilty, they would be obligated, even if they still believe there is probable cause, to inform the issuing magistrate of the new information. If the police develop facts which strengthen their view that they have focused on the right suspect, again, they will have to amend their prior affidavits. The validity of the arrest warrant will be judged solely on the basis of the evidence before the issuing magistrate. *Whitely* v. *Warden,* 401 U.S. 560 (1971). Consequently, the police and the prosecutor will want the magistrate to have before him

every piece of evidence which supports a finding of probable cause.

In any serious investigation, numerous amendments of the affidavits will be needed. Witnesses may recant prior statements. The police may learn that an informant was less reliable than first believed. A victim who picked a person from a lineup may subsequently express some doubt. The officers may learn, as they did in *Payton,* that their witness gave the wrong name for the defendant.* On the other hand, the officers may (as they did in *Payton*) locate a second witness who corroborates the information given by the first. They may uncover a second eyewitness. They may obtain the results of fingerprint or handwriting or ballistics analysis, and these results may strengthen their belief that the person named is in fact guilty. All of these facts, and thousands more that could be imagined, will have to be brought to the magistrate who will, in effect, become the supervisor of the investigation.

Thus, a warrant rule will require a shuttle service between the investigating officers and the courts. Each trip will take hours and may consume a major part of an officer's tour of duty. For example, the Second Circuit Court of Appeals recently noted that, in the Southern District of New York, a highly urbanized area in which the courthouse is relatively accessible, federal agents must spend between four and five hours to obtain an arrest warrant. *United States* v. *Campbell,* 581 F. 2d 22, 26-27 n.7 (2d Cir. 1978).

* Were a person arrested on a warrant which did not "truly name" him, the warrant would be invalid and the evidence resulting from the arrest would be suppressed. *See West* v. *Cabell,* 153 U.S. 78, 85-86 (1894); *United States* v. *Jarvis,* 560 F. 2d 494, 497 (2d Cir. 1977), *cert. denied,* 435 U.S. 934 (1978).

One court in California estimated that the time consumed in obtaining an arrest warrant is "between six and eight hours." *James* v. *Superior Court of Tulare County,* —— Cal. App. 3d ——, 151 Cal. Rptr. 270, 272, 275 (1978). In other places, it would undoubtedly take longer. *See Pawloski* v. *State,* —— Ind. ——, 380 N.E. 2d at 1233 (the Indiana Supreme Court assumed that arrest warrants are unobtainable on weekends).

An arrest warrant requirement will divert scarce police resources from the most important phase of the police investigation. At a time when the police should be focusing their attention on questions such as "Do we have the right person?" and "Do we know where to find him?", the police will be forced to consider different questions. Is it time to get a warrant? Is it necessary to bring this new piece of information to the judge? Is a prosecutor available to put the information together in an understandable form? Where are the typists? Is a judge available? Is a court reporter available? How long will it take to drive to the courthouse? Will the judge see us immediately? How long will the appearance before him take? *See People* v. *Burrill,* 391 Mich. 124, 214 N.W. 2d 823 (1974) (arrest warrant invalidated because the issuing magistrate did not sufficiently question the witnesses in support of the warrant). And perhaps most importantly, what portion of the investigation should be postponed while some officers spend hours obtaining and updating the warrant? If society wants the right person to be found and brought to justice, it cannot obstruct the pursuit of the felon with an obstacle as substantial as the arrest warrant requirement.

Appellants suggest that some of these difficulties would be minimized by excusing the police from obtaining a warrant until they actually decide to make an arrest in a dwelling. Appellants' Brief at 37. This suggested rule would create equally substantial problems, both for the courts and the police.

The first question would be, whose decision is determinative, that of the investigating officer, his team, their supervisor, or the district attorney? Then a reviewing court would have to determine exactly when this person or group of people made the decision. This determination would rarely be easy. Investigations are fluid. Bells do not ring when the evidence in the police's possession suddenly amounts to probable cause. As the officers investigate, the belief may grow, then solidify, that the defendant is the right person and should be arrested in his residence. Pinpointing exactly when that belief solidified will be largely dependent on the officer's testimony about his own state of mind and his reconstruction of the events. The difficulties of basing a decision on testimony like this will likely lead the courts to change the question at issue. The litigation will focus not on when the officer in fact decided to arrest in a dwelling but rather on when a reasonable officer would have made that decision. That question often translates into, when does a reviewing court, using hindsight, think that the decision to arrest in a dwelling should have been made?

If we are correct, then the officer on the street will be forced to keep one eye on his investigation and the other on what a court, looking back on events, will believe to be the reasonable time to make the arrest. Officers will be en-

couraged to arrest as soon as posible because, if they wait, they will risk a subsequent ruling that the decision to arrest could have been made sooner—when they had time to obtain a warrant.

The *Payton* case itself is a good example of the dangers of pressuring the police to make arrests too soon. Appellant suggests that the officers could have attempted to arrest Payton in his apartment on the afternoon of January 14 (when Leggett pointed out Payton's building) and should have sought an arrest warrant then. Appellants' Brief at 7, 62. It would, however, have been irresponsible and dangerous to make an arrest then. At that time, the police knew neither Payton's correct name nor what he looked like. They did not know whether he was going to be in his apartment. (In fact, after the murder, Payton told Leggett he was going "some-where." *See* note, pp. 9-10, *supra.*) Also, the police knew nothing about the building or the apartment, for example, whether other people lived with Payton or whether there were escape routes that needed covering. Finally, they had not had time to consider whether there were other, safer places where Payton could be arrested.

Of course, there comes a point in any investigation at which it can be determined with certainty that the police intended to make an arrest in a dwelling. In *Payton,* that time was the morning of January 15, when the officers came to Payton's door, saw a light shining from inside, heard a radio, knocked, called out, and received no answer. According to the rule appellants suggest, the officers should have then, as at many earlier points in the investigation, ceased their activities for the hours needed to obtain an

arrest warrant. Appellants' Brief at 62-63. Presumably, for this entire period, they should have laid siege to the apartment. Under appellants' theory, the dangers of delay in these circumstances—dangers of detection, escape and armed confrontation—are to be ignored. *See e.g., United States* v. *Campbell,* 581 F. 2d at 26-27; *Brooks* v. *United States,* 367 A. 2d 1297, 1303 (D.C. 1976); *United States* v. *Shye,* 492 F.2d 886, 892 (6th Cir. 1974).

The rush to the courthouse that would result from a warrant requirement conflicts with fundamental concepts of safety and effective law enforcement. "An armed subject threatens the safety, not only of the arresting officer but of any nearby man, woman, or child." POLICE MANUAL at 81. The unplanned and ill-considered arrest of armed killers such as Payton has results—possible injuries to officers, bystanders, and defendants. For this reason, policemen should be encouraged to "take as much time as is reasonably necessary to plan arrests." *Id.* at 80. The police also should be encouraged to take the time to plan investigations. With planning, the likelihood of catching the right person increases. The basic problem with the arrest warrant requirement urged by appellants is that, if the police take any deliberate step other than obtaining an arrest warrant, they assume the risk that a subsequent warrantless arrest will be deemed a violation of the Fourth Amendment.

The rule in California, which adopted an arrest warrant requirement in 1976, appears to be identical to that asserted by appellants—that is, any reflective police conduct, even tracking down the killer or planning a safe arrest, proves that a warrant was obtainable. For example, in *People* v.

Ellers, 82 Cal. App. 3d 809, 147 Cal. Rptr. 433 (1978, ***hearing granted***), an undercover agent purchased heroin in an apartment being used for continuing heroin transactions. The agent immediately reported the completion of the sale to an officer waiting outside the residence. That officer then radioed other policemen who, after meeting in a parking lot, spent ten minutes planning the arrest of the heroin dealer. The court held that the officers' brief deliberation conclusively proved that there was no exigency to excuse them from obtaining an arrest warrant. In *Johnny V.* v. *People*, 85 Cal. App. 3d 120, 149 Cal. Rptr. 180 (1978), the police were investigating a particularly brutal murder. In the seven hectic hours after the killing, the police investigated without interruption and ultimately traced the killer to a residence, where they were admitted by the owner of the residence. The police were led to a bedroom which was locked from the inside. The officers knocked, and there was no response. The owner of the residence asked his son (who was inside the room with the suspect) to open the door, which he did, and the officers entered and arrested the suspect. In subsequent litigation, this arrest was found to be unlawful. The reviewing court thought it obvious that the police could have obtained an arrest warrant. *Id.* at 185-86. Therefore, the court suppressed evidence seized incident to the arrest. Implicit in the court's conclusion is reasoning identical to appellants': The "decision to arrest in the home is deliberate" and, if the officers had time to proceed to the residence, "there is no reason why" they could not have obtained a warrant. Appellants' Brief at 37.

Indeed, the warrant requirement espoused by appellants is so inflexible that police risk suppression if, rather than

obtaining a warrant, they eat, rest or go to sleep. For example, in *Payton*, the police were investigating continuously on January 12, 13 and 14. They did not go to Payton's apartment until 7:30 a.m. on January 15. If the officers were resting or eating during the night of January 14 or morning of January 15, the entry to arrest would, under appellants' rule, be unlawful.

Respecting the officers' need to rest and eat has nothing to do with deferring to their personal comfort. At some point, the officers knew that they might go to the door of a suspect believed to be armed with a high-powered rifle. They knew that they might have to knock and call out. Perhaps the answer would have been a bullet through the door or, if the door was forced open, a bullet through the first officer into the room. The most minimal respect for lives requires a recognition that the officers arresting the armed felon will best be able to protect themselves (and others) if alert. Yet, under the rule espoused by appellants, the officer who dares to rest prior to risking his life runs the risk of a court finding that, for example, with a few hours less sleep, he would have had time to obtain an arrest warrant.

The burdens created by an arrest warrant requirement are onerous. Accordingly, several courts other than the New York Court of Appeals have declined to create one.* Other courts have adopted the requirement but without ana-

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* *See United States* v. *Williams*, 573 F.2d 348, 350 (5th Cir. 1978); *State* v. *Linkletter*, 345 So.2d 452, 456 (La.), *cert. denied*, 434 U.S. 1016 (1978); *State* v. *Perez*, 277 So.2d 778, 782-83 (Fla.), *cert. denied*, 414 U.S. 1064 (1973); *State* v. *Luellen*, 17 Wash. App. 91, 562 P.2d 253 (1977).

lyzing the burdens on law enforcement.* Two courts which had adopted such a requirement are now beginning to doubt its validity and wisdom. The Massachusetts Supreme Judicial Court has suggested that it erred when, in 1975, it abandoned the common law rule authorizing warrantless arrests of felons. *Commonwealth* v. *Boswell,* —— Mass. ——, 372 N.E. 2d at 241; *Commonwealth* v. *LeBlanc,* —— Mass. ——, 367 N.E. 2d at 850, n. 2. In December 1978, one panel of judges in the Ninth Circuit Court of Appeals simply ignored a decision four months earlier which had adopted a warrant requirement. *United States* v. *Johnson,* —— F.2d —— (9th Cir., December 19, 1978); *United States* v. *Prescott,* 581 F.2d 1343 (9th Cir. 1978). Other courts, which have not yet expressly stated their doubts about the warrant requirement they created, have nonetheless exhibited their doubts by applying so many exceptions that,

* *See Salvador* v. *United States,* 505 F.2d 1348, 1351-52 (8th Cir. 1974); *United States* v. *Shye,* 492 F.2d 886, 891 (6th Cir. 1974); *United States* v. *Shye,* 473 F.2d 1061, 1067, note 1 (6th Cir. 1973); *Vance* v. *North Carolina,* 432 F.2d 984, 990-91 (4th Cir. 1970); *State* v. *Max,* 263 N.W.2d 685, 687 (S.D. 1978); *Dent* v. *State,* 33 Md. App. 547, 365 A.2d 57, 59-60 (1976).

Other courts, many in light of *Coolidge* v. *New Hampshire,* 403 U.S. 444 (1971), have reserved the issue. *People* v. *Wolgemuth,* 69 Ill.2d 154, 370 N.E.2d 1067, 1070 (1977), *reversing,* 43 Ill. App. 335, 356 N.E.2d 1139 (1976) (the lower court had adopted an arrest warrant requirement); *State* v. *Lashley,* 306 Minn. 224, 236 N.W.2d 604 (1975), *cert. denied,* 429 U.S. 1077 (1977); *State* v. *Girard,* 276 Or. 511, 555 P.2d 445, 447 (1976) (en banc); *People* v. *Burrill,* 391 Mich. 124, 214 N.W.2d 823, 829, note 18 (1974).

In Colorado, the law is unclear. *See People* v. *Robertson,* —— Colo. App. ——, 577 P.2d 314, 316, note 1 (1978); *People* v. *Hoinville,* —— Colo. ——, 553 P.2d 777, 780 (1977) (en banc); *People* v. *Moreno,* 176 Colo. 488, 491 P.2d 575, 580 (1971); Colo. Rev. Stat. former §16-3-102(1)(c) (1973).

in spite of the requirement, many warrantless arrests in dwellings are validated.*

We recognize that in some cases an arrest warrant requirement will interfere with basic police functions less severely than in others. It could be argued that the Court should distinguish between types of cases by adopting a warrant requirement only in cases where it would not interfere with the investigation. This attempt has been made—without, we believe, any success.

For example, in one case, the District of Columbia Circuit Court of Appeals said that a court should consider seven factors in analyzing the permissibility of a warrant-

* For example, warrantless entries to arrest were upheld where the courts found:

(1) a consent-to-enter apparently given at the point of an officer's gun, *United States* v. *Scott,* 578 F.2d 1186, 1188 (6th Cir. 1978);

(2) "exigent circumstances" excusing the failure to obtain an arrest warrant, even though the officers actually had obtained a warrant (which the court ruled defective), *Vance* v. *North Carolina,* 432 F.2d 984, 990-91 (4th Cir. 1970);

(3) the "urgent" need to act even though the urgency was created by the police, *United States* v. *Kulscar,* 586 F.2d 1283, 1285, 1287 (8th Cir. 1978) and *United States* v. *Shye,* 492 F.2d 886, 888 (6th Cir. 1974) (urgency created by visible police presence where, rather than obtain a warrant, six officers remained outside an apartment with the expectation that the lessee would come by and consent to their entry);

(4) exigency where, between the development of probable cause and the arrest, there were four hours to obtain a warrant, *United States* v. *Campbell,* 581 F.2d 22, 24 (2nd Cir. 1978);

(5) "dangers" of flight and destruction of evidence where, aside from the fact that there had been a violent felony, there was concrete evidence of neither, *Pawloski* v. *State,* —— Ind. ——, 380 N.E.2d 1230, 1233 (1978) (murder), *Brooks* v. *United States,* 367 A.2d 1297, 1303 (1976) (rape), and *Stuck* v. *State,* 255 Ind. 350, 264 N.E.2d 611, 615 (1970) (murder).

less arrest. *See Dorman* v. *United States*, 435 F. 2d 385, 392-93 (D.C. Cir. 1970) (en banc). The problem with a set of guidelines such as those in *Dorman* is that, except for extreme situations, they offer little practical guidance to the police. Although the jurisdictions which have adopted an arrest warrant requirement generally make exceptions based on guidelines similar to that in *Dorman*, the decisions are hopelessly contradictory regarding, *inter alia*, the definition of exigency, the reasonableness of the policeman's fear that the felon will escape, the possibilities of obtaining a warrant, and whether or not an entry to arrest was in fact consensual.* As predicted in *Watson*, the arrest warrant requirement has encumbered the criminal process with endless lawyering. *United States* v. *Watson*, 423 U.S. at 423-24. If the Court adopts such a requirement, one could expect the confusion to spread to all fifty states.

Such a result will not be tolerable. A police officer must know in advance, and quite clearly, when he does not need a warrant to arrest a felon in his dwelling. There must be categorical rules, not vague "guidelines" that make sense,

* *See, e.g., United States* v. *Campbell*, 581 F. 2d 22, 26-27 (2d Cir. 1978); *James* v. *Superior Court of Tulare County*, —— Cal. App. 3d ——, 151 Cal. Rptr. 270, 273-75 (1978); *People* v. *Peterson*, 85 Cal. App. 3d 163, 149 Cal. Rptr. 198, 203 (1978); *Johnny V.* v. *People*, 85 Cal. App. 3d 120, 149 Cal. Rptr. 180, 183-86 (1978); *Pawloski* v. *State*, —— Ind. ——, 380 N.E. 2d 1230, 1233 (1978); *In re Scott K.*, 75 Cal. App. 3d 162, 142 Cal. Rptr. 61, 63 (1977, *hearing granted*); *In re Reginald B.*, 71 Cal. App. 3d 398, 139 Cal. Rptr. 465 (1977); *People* v. *Superior Ct.*, 68 Cal. App. 3d 780, 137 Cal. Rptr. 586 (1977); *Brooks* v. *United States*, 367 A. 2d 1297, 1302-03 (D.C. 1976); *Banks* v. *State*, 265 Ind. 71, 351 N.E. 2d 4, 9, *cert. denied*, 429 U.S. 1077 (1977); *Commonwealth* v. *Walker*, —— Mass. ——, 350 N.E. 2d 678, 683, *cert. denied*, 429 U.S. 943 (1976); *Commonwealth* v. *Moran*, —— Mass. ——, 345 N.E. 2d 380 (1976); *Finch* v. *State*, 264 Ind. 48, 338 N.E. 2d 629, 631 (1975).

if at all, only in the calm and safety of the courtroom. The Court has already recognized the need for categorical rules in similar circumstances. *United States* v. *Robinson*, 414 U.S. 218 (1973); *see* LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures:" The Robinson Dilemma*, 1974 SUP. CT. REV. 127. In fact, in this regard, *Watson* is indistinguishable from this case. In some circumstances, the police might be hampered by having to obtain a warrant to effect an arrest in public; in others, they would not be hampered. To distinguish between these situations, this Court was urged to adopt a warrant preference qualified by various exceptions (Respondent's Brief in *United States* v. *Watson*, *supra*, at 6-8). Nevertheless, the Court recognized the severe limits of case-by-case litigation—that is, that ambiguous rules make it difficult, if not impossible, for the officer to determine beforehand whether his conduct will be proper. The Court held, categorically, that warrants would not be required. As much as in *Watson*, the same categorical rule is needed here.

2. *Because searching a dwelling involves very different interests than arresting a felon there, a warrant requirement—necessary in the context of searches—is neither necessary nor advisable in the context of arrests.*

Against the weight of common law history, the history of the Fourth Amendment, the legislative approval and judicial acceptance of arrests in dwellings without arrest warrants, the community's overwhelming interest in capturing felons, and the serious burdens a warrant rule would impose on law enforcement authorities, appellants offer only an argument based on the false "logic" of

"symmetry." Officers ordinarily need a warrant to enter a dwelling to seize things. Therefore, the argument runs, they must also need a warrant to enter a dwelling to seize a person. This argument ignores the fact that, as our predecessors realized, searches and arrests, no matter where effected, involve different interests and social policies.

Certainly, arresting someone in his home amounts to a serious intrusion. But the major part of that intrusion derives from the fact of arrest itself. In a fairly large number of cases—for example, Riddick's—the entry may be relatively inoffensive: A simple knock leads the suspect or some other person to open the door, at which time the suspect appears in the officers' view. *See, e.g., Commonwealth* v. *Boswell,* —— Mass. ——, 372 N.E. 2d at 241 (1978); *see also United States* v. *Santana,* 427 U.S. at 42. An arrest, however, regardless of where it is effected, constitutes virtually a total loss of the arrested person's liberty and privacy. It subjects him to detention in hostile surroundings, indignities (like being searched, handcuffed and fingerprinted), and damage to reputation and future job prospects. It may also expose him to physical injury, loss of present employment or schooling, and impairment of ties with family and friends. *See generally Gerstein* v. *Pugh,* 420 U.S. 103, 114 (1975); ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to §120.1 at 290-91 (1975) (hereinafter "PRE-ARRAIGNMENT CODE"). Nonetheless, this Court has already held that no warrant is necessary to unleash the dire consequences set in motion by an arrest. *United States* v. *Watson, supra; United States* v. *Santana, supra.*

According to appellants, the fact that the arrest takes place not in public but in a dwelling adds to the suspect's loss of liberty and privacy even though an arrest inside is screened from the prying eyes of the world. It is this claimed additional "loss" that makes the arrest within the dwelling just the same as the search of a dwelling and justifies the imposition of a warrant requirement. This argument misconceives (1) the nature of a search within a dwelling, (2) the nature of an arrest in the dwelling, and (3) the effectiveness or usefulness of a warrant in protecting the different interests involved.

Evidence of crime may be found anywhere and in almost anyone's possession. As our forefathers well understood, the power to search for evidence subjects every citizen, no matter whether law-abiding or not, to the intrusive power of the police. *See, e.g., Zurcher* v. *Stanford Daily,* 436 U.S. 547 (1978); *Bumper* v. *North Carolina,* 391 U.S. 543 (1968). This power is most grave and subject to greatest abuse when the things to be seized may be found in a person's home. The police may have to rummage through the whole house, exploring every nook and cranny, before they find the object of their search. They may spend hours opening closets, poking through drawers, prying up carpets, ripping upholstery. *See, e.g., Entick* v. *Carrington,* 19 St. Tr. 1029 (1765); *Mincey* v. *Arizona,* —— U.S. ——, 57 L.Ed. 2d 290, 298 (1978). The smaller and more fungible the items sought, the longer and more intensive the search that is need to insure that all of the articles have been uncovered. And when the officers are hunting for documents, they can open file cabinets and desk drawers and read through masses of personal papers until

they find the particular files or records in question. Finally, the police may leave with things of particular value, financial or personal, to the owner.

For these reasons, the search warrant requirement is essential. A search warrant limits the scope of the officers' quest by requiring that the objects of the search be particularly described. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971) (plurality opinion). *See, e.g., Mincey* v. *Arizona, supra; Andresen* v. *Maryland,* 427 U.S. 463 (1976). A search warrant also informs the occupant of the purpose and bounds of the officers' mission and assures him that their objective is lawful. *See Camara* v. *Municipal Court,* 387 U.S. 523, 532 (1967). Finally, a search warrant provides for the prompt return of the property to the court's control, so that issues regarding right of possession or use in evidence can be determined as soon as possible. *See, e.g.,* N.Y. CRIM. PROC. LAW §§690.45(7), 690.50(5) (McKinney 1971). *See generally* PRE-ARRAIGNMENT CODE §220.4(2) and Commentary at 516. Ordinarily, no such safeguard governs the disposition of items seized in the course of a warrantless search. *Id.,* Commentary on Article 280, at 555-56.

The authority to arrest a felon in his dwelling involves very different interests. Inherent in this authority is its own limitation. Police officers may not enter a suspect's dwelling unless they have probable cause to believe he has committed a felony and is inside. *See, e.g.,* N.Y. CRIM. PROC. LAW §§140.10(1)(b), 140.15(4) (McKinney 1971); PRE-ARRAIGNMENT CODE §§120.1(1)(a), 120.6(1). Many fewer people are subject to this power than to the power to

search; and those who are subject to the arrest power are much less likely to be law-abiding citizens.

In addition, before the officer enters a dwelling he must give the suspect the right to surrender peaceably and thus avoid a trauma associated with the power to arrest inside a dwelling—a forcible entry. Only if he is denied admission after stating his authority and purpose can he proceed to "break" the door. *See generally Sabbath* v. *United States,* 391 U.S. 585 (1968); *Ker* v. *California,* 374 U.S. 23, 37-41, 46-59 (1963) (plurality opinion and opinion by Brennan, J.); *Miller* v. *United States,* 357 U.S. 301 (1958); N.Y. CODE CRIM. PROC. §178 (McKinney 1958); N.Y. CRIM. PROC. LAW §§120.80(4), 140.15(4) (McKinney 1971). An arrest warrant would neither enhance nor enforce the protections of the "knock and announce" laws.

If the officers must force their way in to make the arrest, again, an arrest warrant would be of very limited utility. Unlike when the police enter to search, a warrant would not be necessary to define the scope of their mission, which is quite clear and quite limited: to arrest a particular person. Nor, when officers make an arrest in a dwelling do they need a warrant as a form of credentials. They are engaging in their best accepted, most basic law enforcement task; and the suspect will usually have "every reason to expect the [policeman's] knock on the door." *Vance* v. *North Carolina,* 432 F.2d 984, 991 (4th Cir. 1970).

True, in some cases, as appellants mention, the arrest might involve a cursory glance of personal items, the presence of persons other than the suspect, or looking around for the suspect himself. But the officers will have little in-

terest in prolonging their stay or their search beyond what is necessary. Self-interest dictates that the police leave as quickly as possible. Arresting an armed felon in his home is dangerous since the suspect is on familiar "turf." Therefore, as the New York State Police Manual instructs, the suspect "should be promptly removed." POLICE MANUAL at 83. If, in any particular case, the police search beyond what is necessary to accomplish their goal, whatever they find will be suppressed. *See Vale* v. *Louisiana,* 399 U.S. 30 (1970); *Chimel* v. *California,* 395 U.S. 752 (1969).

Lastly, and once again unlike when there is a search for evidence, when police officers arrest a felon in his dwelling there is no need for a warrant in order to ensure a "return." When arrested with or without a warrant, the suspected felon must be brought before a court promptly. *See, e.g.,* N.Y. CRIM. PROC. LAW §140.20(1) (McKinney 1971). *See generally Gerstein* v. *Pugh, supra.* The judicial system then mobilizes so that the deprivation of liberty may be tested.

The arrest warrant, in its sphere, simply does not serve the same protective function as does the search warrant in its. Indeed, in many respects an arrest warrant requirement will limit protections already afforded suspects arrested in their homes. For example, an arrest warrant requirement will strip those falsely arrested of their historic right to damages, because the mere existence of an arrest warrant—even if not based on probable cause—will ordinarily shield the officer from liability. W. PROSSER, LAW OF TORTS §25, at 127-28 (4th ed. 1971); ALI, RESTATEMENT (SECOND) OF TORTS §122 (1965). *See, e.g., Stine* v. *Shuttle,* 134 Ind. App. 67, 186 N.E.2d 168 (1962) (en banc); *Rush* v. *Buckley,* 100 Me. 322, 61 A. 774 (1905); *Pallett* v. *Thompkins,* 10 Wash.2d 697, 118 P.2d 190 (1941). And, in spite of what appellants may say about the theoretical defenses available to police officers, Appellants' Brief at 54 n.37, plaintiffs in fact recover substantial awards, even when the officer-defendants did not engage in egregious conduct. *See, e.g., Broughton* v. *State,* 37 N.Y.2d 451, 335 N.E.2d 310, 373 N.Y.S.2d 87, *cert. denied,* 423 U.S. 929 (1975) (two cases: one award was $5,000; the other was unspecified); *Smith* v. *County of Nassau,* 34 N.Y.2d 18, 311 N.E.2d 489, 355 N.Y.S.2d 349 (1974) (damages of $15,000); *Velovic* v. *City of New York,* N.Y.L.J., Feb. 9, 1979, p. 12, col. 1 (N.Y. Civ. Ct.) ($150,000 jury award conditionally reduced to $22,000). *See also St. Louis Globe-Democrat, Weekend ed.,* Sept. 30-Oct. 1, 1978, p. 17A, col. 1 (family awarded $45,000 in false arrest case). A recent study by the International Association of Chiefs of Police, which surveyed litigation against policemen over a period of five years, showed that (1) false arrest suits constituted over 40% (the largest category) of the steadily rising number of actions against officers, (2) in a substantial proportion of all the actions brought against officers, the plaintiff received some kind of satisfaction either through settlement or, less frequently, by victory in court, and (3) in the suits that were tried and won by the plaintiff, the mean verdict was somewhat more than $3,000.*

In some jurisdictions, a warrant requirement may result in longer detention of people who have been taken into cus-

* *See* IACP, SURVEY OF POLICE MISCONDUCT LITIGATION 1967-71, at 5-7 (1974).

tody but who are not guilty. For example, under present New York procedures, the arresting officer or his superiors may review the evidence, listen to whatever the defendant wants to say and evaluate his story. Then the officers can decide that no probable cause exists to believe that the defendant committed the crime and, consequently, liberate him at the stationhouse. N.Y. CRIM. PROC. LAW §140.20(4) (McKinney 1971). Similarly, when the suspect is brought to the prosecutor who will prepare the case for arraignment, that prosecutor may in his discretion order the release of the arrested party. These options will be foreclosed under an arrest warrant procedure, since a warrant is not simply a license to arrest; it is a command to take a person into custody and produce him before the court. *See* N.Y. CRIM. PROC. LAW §120.10(1) (McKinney 1971). *See also* Comment, *The Legal Efficacy of Probable Cause Complaints in Light of People* v. *Ramey*, 13 CALIF. WESTERN L. REV. 456, 471 (1977) (same problems under California law).

Lastly, and ironically, an arrest warrant requirement will limit the ability to test the one thing the requirement is supposed to ensure—the existence of probable cause. A person arrested without a warrant may challenge the existence of probable cause in a hearing on a motion to suppress evidence. *See, e.g.*, N.Y. CRIM. PROC. LAW §710.60(4) (McKinney Supp. 1978). At that hearing, the basis for the officer's conclusion of probable cause can be explored; the officer's credibility will often be an important factor in the judge's decision. If the defendant succeeds in his challenge he will get a tremendous benefit—the suppression of probative evidence against him. Theoretically, the suppression will also serve to deter future entries without probable cause. By contrast, one

who is arrested upon a warrant will find that his ability to question the officer and attack his credibility is severely limited. Except in the rare instance when the defendant can allege and prove that the affiant made a reckless or intentional misstatement, vital to the issuance of the warrant, the attack on the existence of probable cause will be limited to the face of the affidavits. *Franks* v. *Delaware*, —— U.S. ——, 57 L.Ed. 2d 667 (1978).

An arrest warrant requirement, we believe, has only one thing in its favor. In some cases a magistrate might refuse to sign the warrant when the police have not shown probable cause. The police would therefore not arrest the suspect in a dwelling at that time. Even here, though, the warrant requirement will be a very imperfect tool. Forced to make quick determinations, in *ex parte* proceedings, overburdened magistrates sometimes issue even search warrants routinely "without serious consideration of whether probable cause exists." LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. L. BULL. 9, 27 (1972) (hereinafter "LaFave, *Warrantless Searches*"). The reported cases, not surprisingly, document many instances of judicial error in approving search warrants. *See, e.g., Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *State* v. *McMillin*, 206 Kan. 3, 476 P.2d 612 (1970) (warrant invalid; search upheld on other grounds); *Application of Gray*, 155 Mont. 510, 473 P.2d 532 (1970). When magistrates are asked to pass upon arrest warrants, limitations on their ability to provide an effective screen will be even greater. *See generally* LaFave, *Warrantless Searches* at 27. There will be thousands of such applica-

tions; and especially when serious crimes are involved, magistrates may respond to the strong community interest in apprehending dangerous felons by "rubber-stamping" the applications. The pressure arising from knowledge that capture of a murderer or robber, possibly armed, might depend on the warrant's prompt issuance will frequently prove to be irresistible.

To summarize: In most respects an arrest warrant requirement is not needed to protect the personal interests at stake when an officer arrests a felon in his dwelling. In other respects, the requirement will actually reduce protections. In the one way that the requirement might do some good, it will be a very imperfect device. On the other hand, an arrest warrant requirement would place an enormous and, we believe, unacceptable burden on the police's ability, quickly and safely, to catch dangerous felons. Even if the Court were being asked to rule on what is preferable social policy, and not what is required by the Constitution, a warrant rule would simply not be worth the price.

C. Even if arrest warrants are generally required, Payton's arrest without a warrant was proper because it was the result of a continuous and intensive pursuit of an armed killer.

The community has a much greater interest in the apprehension of felons than in the seizure of evidence. Even if the difference does not dissuade this Court from imposing an arrest warrant requirement, it should, we believe, dissuade the Court from making the requirement excessively rigid. Weight must be given to the strong community interests involved. A reading of many cases which apply

an arrest warrant requirement leaves the reader with the powerful sense that, no matter what the reasoning or the language used, most of these courts recognize these legitimate community interests and find ways not to interfere with the apprehension of dangerous felons. Often the courts do so, properly, by excusing the failure to obtain an arrest warrant in circumstances that would not justify the warrantless search for evidence. *See* cases collected in footnote at p. 65, *supra*.

Ordinarily, a warrantless search of a dwelling can be excused only if there is concrete proof that evidence will be destroyed during the minutes or hours necessary to obtain a search warrant. *See Roaden* v. *Kentucky*, 413 U.S. 496, 505 (1973); *McDonald* v. *United States*, 335 U.S. 451, 454-55 (1948). The standard for warrantless arrests should not be so severe. Armed felons are dangerous and mobile. The police need leeway in deciding how and when to arrest. They must consolidate their evidence; discuss the plans for arrest; eat and rest so that, if there is an armed confrontation, they will be prepared. During this crucial period, the officers should not be asked to predict how long it would take to get a warrant and whether, while a warrant is sought, the suspect will escape.* In short, their attentions should not be diverted from their important tasks. *See* pp. 54-63, *supra*.

In the volatile world of apprehending felons, the courts should be, and have been, reluctant to second-guess the

* *See United States* v. *Brown*, 540 F. 2d 1048, 1055 (10th Cir.), *cert. denied*, 429 U.S. 1100 (1977) (warrantless arrest three days after an armed robbery upheld despite claim that, since felon was found in his dwelling, he obviously was not planning to flee).

investigating officers. In one Indiana case, the police had probable cause to arrest the defendant for murder at 5:00 p.m. However, the officers did not arrest him until the early morning hours of the next day. The reviewing court held that the circumstances were "exigent." *Banks* v. *State,* 265 Ind. 71, 351 N.E. 2d 4, *cert. denied,* 429 U.S. 1077 (1977). In a recent federal case, the police arrested an armed bank robber four hours after first having probable cause. *United States* v. *Campbell,* 581 F. 2d 22, 24 (2d Cir. 1978). The court stated that the officers were "not obligated by the Fourth Amendment" to aggravate "the existing risk of violence, escape and destruction of evidence by waiting until a warrant could be obtained." *Id.* at 27. Whether or not they say so explicitly, these cases, and many others,* recognize that the courts should not require an interruption of the continuous pursuit of the felon who is armed, dangerous, and only a step or two beyond the officers.

The same factors are present here. Payton committed a murder with a high-powered rifle. After the murder, as the hearing judge found, the officers had reason to believe that Payton was still "armed and could be a danger to the community" (A.41). For two days after the murder, the officers investigated intensely but without success. Then, on January 14, evidence regarding the identity and location of the gunman quickly began to emerge. Detective Malfer met one witness at the Manhattan District Attorney's Office in the morning, and then drove to meet another witness in the Bronx in mid-afternoon. Detective Malfer was with this witness the rest of the day and evening—talking to him, going to Payton's building, and then returning to the 23rd Precinct in Manhattan. This intensive investigation led the officers at 7:30 the next morning to the door of Payton's apartment. They knocked and called out, and although they saw a light shining from under the door and heard a radio from inside, they received no answer. Thus, they had "strong reason to believe that the suspect was [inside] and that he would escape if not swiftly apprehended" (A.41). In these circumstances, as Judge Wachtler said in the Court of Appeals below, "[i]t was reasonable for the police to continue their pursuit into the apartment in order to take a dangerous killer into custody" (A.82).

* *See e.g. United States* v. *Shye,* 492 F. 2d 886 (6th Cir. 1974); *Vance* v. *North Carolina,* 432 F. 2d 984 (4th Cir. 1970); *People* v. *Saars,* —— Colo. ——, 584 P.2d 622 (1978) (en banc); *State* v. *Ferguson,* 119 Ariz. 55, 579 P.2d 559 (1978) (en banc); *Pawloski* v. *State,* —— Ind. ——, 380 N.E. 2d 1230 (1978); *Commonwealth* v. *Moran,* —— Mass. ——, 345 N.E. 2d 380 (1976).

If, however, the Court believes that arrest and search warrants must be treated exactly alike, and that time is the only relevant factor, the question becomes whether the police had time to obtain an arrest warrant before they arrested Payton. That question, in turn, depends on when the police first had enough information to obtain one. One court has determined that, if a person's interest in his residence is to be protected by prior judicial review, the police must demonstrate probable cause to believe that the felon is actually inside the dwelling. *United States* v. *Prescott,* 581 F. 2d 1343, 1349-50 (9th Cir. 1978). In *Payton,* the police could not have made such a showing until 7:30 a.m. on January 15. On the previous day, Leggett pointed out Payton's building. But the police also had reason to believe Payton might not be at home. *See*

second footnote and accompanying text on p. 11, *supra*. It was not until they approached his door, saw the light and heard the radio that they had good reason to believe he was inside. Surely, they should not be faulted for failing to halt their pursuit then in order to obtain a warrant. *See* pp. 60-61, *supra*.

* * *

If the Court accepts either of our above formulations of an "exigent circumstances" exception, then the record in this case provides sufficient facts to show that the officers in *Payton* did not need a warrant before they entered Payton's apartment. Should, however, the Court conclude that the only relevant question is whether the officers had time to obtain a warrant and, further, that their duty to obtain one attached at some point before they reached Payton's door (for example, when they first had probable cause to arrest or first made a decision to arrest), then a remand is necessary for further development of the facts. *See Morales* v. *New York*, 396 U.S. 102, 105 (1969).

As noted, by apparent agreement among the parties and the judge, the scope of the suppression hearing was very narrow. *See* pp. 4-6, *supra*. Although some evidence concerning the investigation was elicited, the judge sustained objections by both parties to questions that sought to elicit testimony relevant to whether there was time to obtain a warrant—questions such as whether the police had spoken to an eyewitness to the murder before they went to arrest Payton (A.37), when the police first learned where Payton lived (A.33), whether they had been told by a witness when Payton would be home (A.35), and whether the police received any additional information between January 14 and January 15 (A.34). Consequently, the court's decision did not discuss the practicality of obtaining an arrest warrant. (The trial record does add some detail. However, the issue at trial was, of course, the defendant's guilt or innocence, not the admissibility of evidence.) Even if the scope of the suppression hearing had not been narrowed by the parties and the judge, litigants in 1974 could not be expected to foresee what factors this Court would think relevant in determining the existence of "exigent circumstances."* *See Givhan* v. *Western Line Consolidated School District*, —— U.S. ——, 58 L. Ed. 2d 619, 625-26 (1979). Accordingly, unless the Court agrees with the arguments concerning "exigent circumstances" we have advanced at pp. 76-80, *supra*, the Court should order a remand so that more information can be developed.

POINT II

Payton is not entitled to the benefit of the exclusionary rule because, when the police entered his apartment in January 1970, they did so under the express authority of a state statute, at a time when neither they nor any other law enforcement official could have had any serious doubts about the legality of following the statute.

In the previous pages, we have briefed the issue whether the officers needed an arrest warrant before they could lawfully enter Payton's and Riddick's apartments to effect an

* Contrary to appellants' statements, the Court of Appeals did not find the record sufficient to decide whether it was possible to obtain an arrest warrant. The majority did not concern itself with this aspect of the record since it determined that the arrest was valid regardless of whether a warrant could have been obtained. *See* p. 21, note, *supra*. Judge Wachtler found the failure to obtain a warrant excusable on a "continuous investigation" theory (with which we agree) that does not depend simply on whether the police had time to obtain a warrant.

arrest. For Payton, however, the question cannot be stated so abstractly. At least on this appeal, he has no legitimate interest simply in whether the police should have obtained an arrest warrant. His interest as a litigant is in whether their failure to obtain a warrant should result in the suppression of the shell casing introduced at his trial and the reversal of his conviction. This question, in turn, depends on the proper scope of the exclusionary rule.

Regardless of whether the officers should have had an arrest warrant before entering Payton's apartment, their failure to obtain one does not entitle Payton to the exclusion of the evidence. The officers had probable cause to believe Payton had committed a murder. They entered his apartment during the daytime. They entered under a statute which was enacted not to evade the commands of the Fourth Amendment but to codify accepted practice. In 1970, the officers had no reason to doubt the lawfulness of following this authoritative rule promulgated by the legislature. In these circumstances, giving Payton the benefit of the exclusionary rule would seriously undermine the salutary ends it is supposed to further.*

The exclusionary rule, as one commentator has put it, is strong, if necessary, medicine. Amsterdam, *Search, Seizure, and Section 2255: A Comment,* 112 U. Pa. L. Rev. 378, 389 (1964). In many instances, the rule permits guilty defendants to go free; in all, it keeps indisputably reliable

* Although not considered by the New York courts, this argument is properly raised here as an alternative ground for affirmance. *See United States* v. *New York Telephone Co.,* 434 U.S. 159, 166 n.8 (1977); *Dandridge* v. *Williams,* 397 U.S. 471, 475-76 n.6 (1970); *United States* v. *American Railway Express Co.,* 265 U.S. 425, 435-36 (1924).

and probative evidence from the trier of fact. *Bivens* v. *Six Unknown Agents,* 403 U.S. 388, 412, 416 (1971) (Burger, C.J., dissenting). For these reasons, the Court has refused to apply the rule when to do so would not substantially serve its benign purposes. *United States* v. *Ceccolini,* 435 U.S. 268, 279 (1978); *United States* v. *Calandra,* 414 U.S. 338, 348 (1974). *See, e.g., United States* v. *Janis,* 428 U.S. 433 (1976); *United States* v. *Peltier,* 422 U.S. 531 (1975); *Michigan* v. *Tucker,* 417 U.S. 433 (1974); *Alderman* v. *United States,* 394 U.S. 165 (1969).

The primary aim of the exclusionary rule is to decrease the incidence of illegal conduct by the police. *United States* v. *Calandra,* 414 U.S. at 347-48. Theoretically, the rule encourages compliance with the Fourth Amendment "by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U.S. 206, 217 (1960). Put another way, if the officer disobeys the commands of the Constitution, the rule "punishes" that officer—or those prosecutors and higher-level police officials who supervise and instruct him—and thereby deters both him and others from future misconduct. *See United States* v. *Peltier,* 422 U.S. at 558-59 n.18 (Brennan, J., dissenting).

When a court excludes evidence, it also affects police behavior in a different, more subtle way. If an officer sees that the judiciary "attach[es] serious consequences to the violation of constitutional rights," he may perhaps learn from the court's example that in our society, the people's liberties must be respected. *United States* v. *Peltier,* 422 U.S. at 555 (Brennan, J., dissenting), quoting Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665, 756 (1970). If, on the con-

trary, a court admits tainted evidence, it breeds a general contempt for law and may lead the policeman, like the public at large, to believe that "all government is staffed by self-seeking hypocrites. * * *" Paulsen, *The Exclusionary Rule and Misconduct by the Police,* 52 J. Crim. L., C. & P.S. 255, 258 (1961). *See also Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Indeed, since actions speak louder than words, the officer may come to think that the court approves the methods used and actually encourages the illegality. *See id.* at 470 (Holmes, J., dissenting); Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 431-32 (1974).

Whether coercive or exemplary or both, the lesson of the exclusionary rule will surely be lost unless the exclusion is based on what an honest, law-abiding, reasonable officer can understand to be an infringement of a very important constitutional norm. Police officers will not be encouraged to learn the law in order to submit to it—let alone, internalize its values in order to obey it voluntarily—if they are led to regard its operation on them as freakish, capricious and unpredictable. For the exclusionary rule to work at all, the courts must in essence tell policemen: "When you conduct yourselves unlawfully, we will exclude the evidence you seize. But when you behave in a lawful manner, we will accept it." The point is to support the police: not unthinkingly, but rather in such a way as to enhance their comprehension of—and respect for—law, and thereby promote compliance with the Fourth Amendment.

Applying the exclusionary rule in *Payton* can only diminish its effectiveness. How can a policeman, or indeed

any reasonable person, understand why the shell casing should be excluded? Police officers are supposed to conform their conduct to law; here, they did so. *Payton* is not a case in which the police took it upon themselves to judge the legality of entering a dwelling to make an arrest without a warrant. They acted under the express authority of a state statute, designed specifically to govern and limit police power to make arrests.

That statute was passed in 1881. No one could suggest that it was passed in order to evade the commands of the Fourth Amendment. On the contrary, it was designed to codify what was widely understood as accepted practice. *See* p. 46, *supra.** Not only New York but numerous other states had enacted laws empowering police officers to make warrantless arrests in dwellings. *See* ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary, Appendix XI (1975) (as of 1975, 30 of the 36 states having statutes on the subject authorized warrantless forcible entry to arrest for a felony) (hereinafter "PRE-ARRAIGNMENT CODE"). The New York Court of Appeals had said that the legality of such entries depended simply on the existence of probable cause to make the arrest. *People* v. *Loria,* 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S. 2d 462, 467 (1961). Only one court, in the District of Columbia, had come to a different conclusion. *Accarino* v. *United States,* 85 U.S. App. D.C. 394, 179 F.2d 456 (1949).

* *Compare Michigan* v. *DeFillippo* (U.S. No. 77-1680, *argued* Feb. Term 1979), where the state is urging a definition of the exclusionary rule similar to ours. Respondent has claimed that the statute in question there was passed specifically in order to undercut the protections of the Fourth Amendment. That statute makes criminal the failure to produce identification when ordered to do so by a policeman. *See* Respondent's Brief at 4-6 & nn. 4-7, and 16-19.

And even that court had, nine years after *Accarino*, reversed itself twice within seven months.* In any event, both before and after the District of Columbia cases, this Court had accepted (without directly deciding) the validity of felony arrests made in dwellings during the daytime. *See* discussion of cases at pp. 48-49, *supra*.

Thus, when the officers entered Payton's apartment to arrest him in January 1970, they were acting in accord with a statute that had been part of New York's living law for almost one hundred years. Neither the officers nor their supervisors had any reason to doubt the legality of the entry.** As we have said, the exclusionary rule can work only if it teaches policemen that it matters whether or not they make their best efforts to obey the law. But exclusion of the evidence in Payton's case could only impart the opposite lesson: that it does not make a bit of difference whether or not they try to adhere to the rules. The shell casing will be barred not because the constable blundered but rather because he followed the law. Lessons like this one breed confusion, cynicism and scorn for law. Obviously, these are not the attitudes that the exclusionary rule should foster.

Implicitly recognizing this logic, the Court has already refused to apply the exclusionary rule in very similar circumstances. In *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), the Court held that agents of the Border Patrol could not stop and search a car, without probable cause and without a warrant, about 25 miles from the Mexican border. Then, in *United States* v. *Peltier*, *supra*, the Court confronted another roving patrol inspection, conducted four months before the decision in *Almeida-Sanchez*. The items found in the course of searching Peltier's car were not excluded from evidence because the agents could not have foreseen the holding in *Almeida-Sanchez*. They had acted in reasonable "reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval." Mr. Justice Rehnquist wrote for the Court:

> Since the parties acknowledged that *Almeida-Sanchez* was the first roving Border Patrol case to be decided by this Court, unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973). If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

422 U.S. at 541-42 (footnote omitted).*

* *Compare Smith* v. *United States*, 103 U.S. App. D.C. 48, 254 F.2d 751, *cert. denied*, 357 U.S. 937 (1958) *with Morrison* v. *United States*, 104 U.S. App. D.C. 352, 262 F.2d 449 (1958).

** By contrast, when the police went into Riddick's apartment in March 1974, dictum in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) had clearly raised the issue of whether it was constitutional for officers to make warrantless arrests in dwellings during the daytime.

* In *Almeida-Sanchez* itself, the Court applied the exclusionary rule even though, as in *Peltier*, the agents undertook their search before the practice was found illegal. However, as noted by the Court in *Peltier*, the government in *Almeida-Sanchez* did not urge a construction of the exclusionary rule that would have precluded its use in that case. 422 U.S. at 542 n.12.

Responding to the majority opinion, Mr. Justice Brennan, in dissent, suggested several reasons why a defendant should get the benefit of the exclusionary rule even though the police might not have known their behavior was unlawful. Whatever the strength of these arguments in other contexts, they have little validity here.

According to Mr. Justice Brennan's argument, if the exclusionary rule were construed to apply only to "bad faith" action, the police might be encouraged invariably to choose a course of conduct "that compromises Fourth Amendment values." 422 U.S. at 559. For example, such a definition of the exclusionary rule could give the police an incentive to assume the existence of probable cause in marginal cases or to remain wilfully ignorant of developing legal principles. Moreover, since an officer who obtained a warrant could always be said to have acted in "good faith" reliance on the magistrate, a "good faith" rule would give the magistrate unreviewable power to determine probable cause. *See United States* v. *Peltier,* 422 U.S. at 559 n. 18 (Brennan, J., dissenting). Finally, an exclusionary rule dependent on the "good faith" of a police officer might embroil the courts in difficult factual determinations concerning subjective mental states or "reasonable objective extrapolations of existing law." *Id.* at 560.

These problems would not be raised by the formulation of the exclusionary rule we are proposing. We are not urging the Court to allow evidence to be admitted whenever officers in "good faith" follow their own precepts, or even the precepts of a lower judicial officer, about what constitutes

legal behavior. We are urging a much narrower rule that would admit evidence only when, as in Payton's case:

(1) the police follow an unambiguous pronouncement;

(2) that pronouncement is a statute;

(3) the statute clearly was not designed to evade Fourth Amendment requirements; and

(4) at the time the officers act neither they, their supervisors in the police department, nor the district attorneys with whom they work could have any reasonable doubt about the constitutionality of the officers' conduct under the statute.

This formulation avoids the pitfall of "rewarding" police decisions to interpret either the applicable law or the facts of specific cases in a manner that invariably compromises Fourth Amendment values. Our proposed definition of the exclusionary rule also would encourage police officers to defer to legislative judgments—a desirable result since, in a democratic society, representative elected bodies bear the primary responsibility of setting guidelines for the police.

In addition, Mr. Justice Brennan expressed concern that if the exclusionary rule were applied only when the police act in "bad faith" (that it, only when there is clear precedent holding their conduct unconstitutional), judicial development of the Fourth Amendment "could stop dead in its tracks."

> For if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny the accused's motion to suppress if he can-

not cite a case invalidating a search or seizure on identical facts.

422 U.S. at 554.

This argument is based on a faulty premise. Courts do not decide cases by mechanically applying the rule of previous cases dealing with the same facts. Most often, and especially in the Fourth Amendment area where the facts are always peculiar to individual cases, prior rulings are used not as strait-jackets but as analogies. Accordingly, a court will reach the merits of a defendant's constitutional claim even if the defendant cannot find a case holding in his favor on "identical facts."

Moreover, since constitutional norms may be articulated and developed by analogy in a number of different ways, a court faced with a claim under the Fourth Amendment will properly draw on many sources in addition to decisions concerning the admissibility of evidence. For example, Fourth Amendment principles may be derived from civil litigation —such as tort actions and Section 1983 lawsuits for damages or injunctive relief—in state or federal jurisdictions. *See, e.g., Bivens* v. *Six Unknown Agents, supra; Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966); *Broughton* v. *State,* 37 N.Y.2d 451, 335 N.E.2d 310, 373 N.Y.S.2d 87, *cert. denied,* 423 U.S. 929 (1975). Fourth Amendment principles may also evolve and find expression in state constitutions, in legislative and executive actions and pronouncements, and through the writings of legal scholars and codifiers. *See, e.g.,* PRE-ARRAIGNMENT CODE and Commentary.

The definition of the exclusionary rule we are urging would not excuse a court from considering these developments or deny a defendant their benefits. The rule would simply allow the state to show, if it could in a particular case, that no such developments could reasonably have alerted the police not to follow a controlling legislative pronouncement. Thus, under the definition we propose, the onus of citing "clear precedent" in their favor would rest on prosecutors seeking to avoid the application of the exclusionary rule and not, as Mr. Justice Brennan feared, on defendants seeking to invoke it. Where the state could not meet this stringent burden, judges would have to decide the defendant's Fourth Amendment claim on the the merits.

In sum, suppressing the evidence found as a result of the entry in *Payton* could only undercut the salutary aims of the exclusionary rule. On the other hand, an exclusionary rule that would admit the evidence would not impede the healthy growth of substantive Fourth Amendment principles. Nor would that rule encourage the police to find ways to violate the law. On the contrary, such an exclusionary rule would reward them for making their very best efforts to follow the law. In that way, it would promote adherence to the Fourth Amendment, which is, of course, what the exclusionary rule is all about.

Conclusion

***For the reasons stated above, the judgment of the Court of Appeals in No. 78-5420* (Payton) *and No. 78-5421* (Riddick) *should be affirmed. In the alternative, a remand for further proceedings should be ordered in No. 78-5420* (Payton). *See pp. 80-81,* supra.**

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IN THE

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vs.

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Appeals from the New York Court of Appeals

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I

Appellee presents no valid reason for exempting entries of the home to arrest from the warrant requirement.

Appellee presents a number of arguments designed to show that the warrant requirement would severely interfere with law enforcement or would otherwise be useless or counterproductive. Because most of these arguments are based on certain fallacies, they are insubstantial. Moreover, those arguments which are not fallacious actually favor the imposition of the warrant requirement. Thus, appellee's arguments do not refute the position stated in our main brief.

The premise underlying each of appellee's arguments that the warrant requirement will "severely interfere" with law enforcement is that the requirement will "lead police officers to get the warrant as soon as possible" (Br. at 51, 55). This premise is false. It is based on the notion that if the officer waits, rather than getting a warrant immediately, and then some exigency requires him to make an immediate, warrantless arrest, his actions will be found unlawful (Br. at 55). The error in this assumption is evident enough, however, for the very exigency that requires the immediate arrest excuses the failure to get a warrant. Where, for example, officers delay making an arrest pending a more thorough investigation and then learn that their suspect has plans to flee the jurisdiction imminently, they may certainly arrest without a warrant. The police can

hardly be expected to allow the suspect to escape, and an immediate warrantless arrest is entirely reasonable under the Fourth Amendment, notwithstanding any prior police decision to delay the arrest. See, e.g., *People* v. *Vaccaro*, 39 N.Y.2d 468, 348 N.E.2d 886 (1976); *Commonwealth* v. *Boswell*, —— Mass. ——, 372 N.E.2d 237, 241 (1978). Thus, the police need not obtain an arrest warrant at the earliest possible moment, for if they do not and a sudden emergency arises, they are entitled to arrest without a warrant, even in a home.

Because the remainder of appellee's arguments depend on the premise that the police must "rush to the courthouse" (Br. at 61) to get arrest warrants, those arguments also fail. Appellee argues, for example, that because of the rush to get the warrant, various intolerable consequences will result: police will seek warrants before they have probable cause, magistrates will erroneously approve them,[1] and innocent people will be arrested or evidence suppressed (Br. at 55-56); the magistrate will, because of the early stage at which the warrant is obtained, become the

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1. Like a number of other arguments advanced by appellee, this one depends on the additional premise that public officials will fail to do their duty if a warrant requirement is imposed. Elsewhere, for example, appellee assumes that courts will fail to find exigency when circumstances required an immediate arrest (Br. at 55) or that magistrates will not give serious consideration to arrest warrant applications which they will "rubber-stamp" (Br. at 75-76). Our position, however, is that magistrates do their duty conscientiously in most cases, that they will give warrant applications whatever scrutiny they deserve, and that they will not suppress evidence where the police reasonably believed emergency action was necessary. We believe the Court's insistence upon the warrant except in certain carefully defined cases is founded on this very premise. See, *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967).

"supervisor of the investigation" (Br. at 56, 57);[2] the police will never know whether to pursue their investigation or to get a warrant (Br. at 58); and the police will make "unplanned and ill-considered" arrests in homes (Br. at 61). As we have shown, however, the police need not rush to get the warrant. Accordingly, they may prolong their investigation to ensure that they have probable cause, need not go immediately to a magistrate after they have it, and may, as appellee advocates, "take as much time as is reasonably necessary to plan arrests" (Br. at 61). The warrant requirement will not force them to make hasty arrests or to subject themselves to danger in the absence of thorough planning. Thus, the awful consequences of police haste envisioned by appellee are little more than phantoms conjured up to avoid the warrant requirement of the Fourth Amendment.

Indeed, appellee's emphasis on the need to plan the entry of homes supports the view that warrants may safely be required for such entries. Appellee repeatedly asserts that before making such entries, the police must take time to assure that they have had dinner and ample sleep (Br. at 62-63), to complete their investigation (Br. at 61), to plan the arrest (Br. at 61), and generally to assure their

2. This particular argument is preposterous on other grounds. It supposes that the police are under some obligation, once they have a warrant to arrest, to inform the magistrate of every further step in their investigation. This is simply not the case. Indeed, appellee cites no authority to support its position. Nor does it appear that any such problem has arisen in those jurisdictions where warrants have long been required for home arrests. And in those places where police departments have voluntarily sought such warrants, the police have apparently not felt hindered by any "supervision" of the magistrate. See W. Lafave, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 45-46 (1965).

own safety (Br. at 61, 63).[3] Since public safety is not jeopardized by this extensive and time consuming preparation, there is no basis for concluding that the time required to get a warrant would create peril.[4]

A number of appellee's other arguments not only fail to support its position but instead support the view that warrants should be required for home arrests.[5] Appellee argues, for example, that if a warrant is obtained, the range of issues defendants can raise at suppression hearings will be curtailed (Br. at 74-75). This argument hardly helps appellee, however, for it demonstrates that the warrant requirement is desirable since it actually tends to reduce litigation and may well result in a decrease in the amount of evidence actually suppressed. Thus, in this context, there

3. Here appellee contradicts its earlier arguments that the interest at stake is the "need to catch armed criminals . . . as quickly as possible" (Br. at 51). Clearly appellee recognizes that this "need" is often qualified and that arrests may frequently be postponed with no danger.

4. *United States* v. *Campbell*, 581 F.2d 22, 26-27 n.7 (2d Cir. 1978), in which an F.B.I. agent testified that it took four to five hours to obtain a warrant in the Southern District of New York, should not be taken as representative. The length of time will, of course, depend on the circumstances of individual cases. In some instances, it could take much less [*People* v. *Vaccaro*, 39 N.Y.2d 468, 472-473, 348 N.E.2d 886, 890 (1976) (two hours to obtain a search warrant in New York County)] and in others more.

5. The remainder of appellee's arguments designed to show that the arrest warrant serves no "protective function" (Br. at 72) are simply false. As appellee recognizes, police sometimes rely on "street talk," "hunches," and informers of questionable reliability in determining whether to act (Br. at 54). Without a warrant requirement, officers may be tempted to arrest in homes on such flimsy knowledge. But the officers may well be reluctant to face a magistrate with the same information as a basis for a warrant application. And if without further investigation, the officer does go to a magistrate, the magistrate's refusal to issue a warrant on less than probable cause constitutes the very protection of constitutional rights which the warrant requirement was meant to ensure.

need be no concern that the warrant requirement will cause extensive litigation. Compare, *United States* v. *Watson*, 423 U.S. 411, 423-24 (1976); see also *United States* v. *Peltier*, 422 U.S. 531, 542-543 n.13 (1975). Appellee also argues that "an arrest warrant requirement will strip those falsely arrested of their historic right to damages, because the mere existence of the arrest warrant . . . will ordinarily shield the officer from liability" (Br. at 72). Here, too, the result appellee laments is in fact desirable, for if police officers have acted conscientiously to obey the Fourth Amendment they should be protected, and additional litigation should not be encouraged. Rather than supporting appellee's position, therefore, both of these arguments provide further reason why warrants should be required for arrests in the home.[6]

In sum, appellee presents no valid reasons for exempting entries of the home to arrest from the warrant requirement.

6. Appellee's argument that the warrant's command that a person be brought to court prevents the police from releasing innocent people is also erroneous (Br. at 73-74). It is true that an arrest warrant in New York, like a search warrant, constitutes a form of "process" commanding the officer to do an act. N.Y. Crim. Proc. Law §§120.10(1), 690.05(2). However, it does not follow that the officer must always execute that process regardless of intervening circumstances. For example, if an officer in New York is ordered by a search warrant to search certain premises and then learns that the wrong premises are named in the warrant, he is not required to search an innocent person's home because of the warrant's command. Similarly, if after obtaining an arrest warrant, the officer acquires information that convinces him the person named in the warrant is the wrong person, he need not make that arrest. There is no obstacle to his returning to court and informing the magistrate that the new information he has obtained vitiates the probable cause upon which the warrant was issued. Cf. *Restivo* v. *Degnan*, 191 Misc. 642, 646, 77 N.Y.S.2d 563, 567 (Sup. Ct. 1948) (magistrate can recall and cancel warrants of arrest issued by mistake).

II

Appellee's argument that appellant Payton is not entitled to suppression of evidence obtained pursuant to a statute directly violative of the Fourth Amendment is without merit.

As an independent basis for affirmance in *Payton*, appellee argues that even if the statute is held unconstitutional, appellant Payton should be denied all relief (Br. at 81-92). The same result is not sought in *Riddick* because appellee deems constitutionally significant the fact that the entry in *Riddick* occurred after *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) which "clearly raised the issue . . ." (Br. at 86).[7] To achieve this, appellee proposes a four-pronged test which, if accepted, would require the Court to overrule *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967) and to depart from long adhered-to principles of constitutional adjudication which afford the prevailing litigant the relief which turns upon the result achieved. Because these principles are sound and the test proposed by appellee unfounded and untenable, appellee's argument is without merit.

In *Stovall*, the Court held that Wade and Gilbert were entitled to the benefit of the rules established in their cases because that benefit is

> an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum.

7. Because appellee expressly recognizes the important functions of the exclusionary rule and the serious difficulties that restriction of the rule to bad faith situations would cause (Br. at 82-84, 88-89) and does not challenge the application of the rule in *Riddick*, we do not address possible expansion of appellee's proposed rule which might affect that case.

> Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law militate against denying Wade and Gilbert the benefit of today's decisions.

388 U.S. at 301. And, as the Court has recently reiterated, Article III remains the principal basis for applying new constitutional doctrines in cases that establish them for the first time. *Bowen* v. *United States*, 422 U.S. 916, 921 (1975).

No less important, as the *Stovall* Court perceived, is the deleterious effect that the likelihood of merely prospective rulings would have upon constitutional adjudication. 388 U.S. at 301. The spectre of a purely prospective ruling, particularly in criminal cases, would effectively preclude important constitutional issues from ever being raised.[8]

8. As Professor Mishkin has observed,

> if parties anticipate such a prospective limitation, they will have no stimulus to argue for change in the law. Indeed, the recognition of even a substantial possibility of such limitation will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases. Under such circumstances, issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or—what may be even more troublesome—if reached by the courts, may be decided upon inadequate argument and consideration.

Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 61 (1965). Of course, the issue of a statute's constitutionality might be raised on an appeal which had been taken because there were other possible grounds for reversal. However, a constitutional determination in such a case would be *dictum*, and since it could not affect the disposition of the case, the court's reaching of the constitutional question would directly contravene this Court's repeated insistence that constitutional questions not be decided unnecessarily. *Bowen* v. *United States*, 422 U.S. 916, 920 (1975).

A non-indigent defendant would not retain an attorney and incur the costs of an appeal if the attorney advised that despite a clear violation of his Fourth Amendment rights, there was no possibility that his conviction could be reversed. A public defender or assigned attorney would, in a world of limited resources, more properly turn his attention to those individuals who could be aided in some concrete fashion.[9]

In pressing its wish to have the Court engage in such a drastic alteration of established principles of constitutional adjudication, appellee relies substantially on *United States* v. *Peltier*, 422 U.S. 531 (1977). That reliance is misplaced. In *Peltier*, the Court was concerned with whether the Fourth Amendment standard announced in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) was to be given *retroactive* application. Indeed, the Court clearly said: "where it has been determined, as in a case such as *Linkletter*, that an earlier holding such as *Mapp* is not

9. Moreover, appellee's assertion that Fourth Amendment principles can be developed in civil litigation (Br. at 90) simply ignores past history and present law. *Mapp* v. *Ohio*, 367 U.S. 643 (1961) was predicated on a finding that remedies other than suppression did not adequately protect Fourth Amendment rights. *Id.* at 651-652. But even if a damage remedy is available for certain Fourth Amendment violations as in *Bivens*, an officer who acts pursuant to the specific mandate of a state statute may have a perfectly valid good faith defense. See, e.g., *Bivens* v. *Six Unknown Named Agents*, 456 F.2d 1339, 1341 (2d Cir. 1972) ("it is a valid defense that the . . . officer acted in good faith and with a reasonable belief in the validity of the arrest and search . . ."). See, also, *Wood* v. *Strickland*, 420 U.S. 308, 313-322 (1975). Thus, adjudication of facially unconstitutional statutes in a civil damage suit is not a logical possibility. Indeed, the illogic of appellee's entire argument on this point is glaring; they urge that where officers act on the basis of a statute the suppression remedy should be removed since other civil remedies are available while wholly disregarding the fact that the officers reliance on the same statute will remove all possibility of a civil recovery.

to be applied retroactively, it has not been questioned that Mapp was entitled to the benefit of the rule enunciated in her case. See *Stovall* v. *Denno,* 388 U.S. 293, at 300-301." 422 U.S. at 542 n.12.

Not only does the *Payton* case not raise any issue of retroactive application, the factors which led the Court to focus its analysis on the good faith of the Border Patrol officials in *Peltier* are entirely absent.[10] When the validity of a statute is before the Court for the first time and it is determined that the statute is violative of the Fourth Amendment, any inquiry into the good faith of the arresting officers or their superiors is beside the point. For when a legislature passes such a statute, it is obvious that the litigant who is first to challenge its validity has no quarrel with the police but with the legislature which authorized them to violate the Constitution. In such a setting the public interest served by the exclusionary rule is that of deterring legislators from enacting statutes which violate the Fourth Amendment. See, Note, 47 N.Y.U.L. Rev. 595, 602-604 (1972). In this respect, the position of a defendant who challenges a statute on Fourth Amendment grounds is the same as one who challenges the validity of a search warrant. In either case, the particular officer involved is acting in good faith on the basis of an authorization by another governmental officer or body; but where, as in the case of the invalid search warrant, the authorization itself violates the Fourth Amendment, the exclusionary rule plays an important role in deterring such authorizations from being made. See, e.g., *Spinelli* v. *United States,* 393 U.S. 410 (1969); *Aguilar* v. *Texas,* 378 U.S. 108 (1968).

10. The situation here is different from that in *Peltier* in one further respect. As the Court observed, the statute in question there had been "supported by longstanding administrative regulations and continuous judicial approval." 422 U.S. at 541. Indeed, the Court emphasized that the courts of appeals had for many years uniformly sustained the constitutionality of the statute facially and also as applied by Border Patrol officers in circumstances like those in *Peltier*. *Id.* at 540-541. Here, on the other hand, the New York courts had never even considered the question of the statute's constitutionality prior to the *Payton* and *Riddick* cases.

Thus, the Court has never refused to apply the exclusionary rule in situations where unconstitutional police conduct was expressly authorized by state statute. In *Coolidge* v. *New Hampshire,* for example, evidence obtained pursuant to a warrant issued by the state's attorney general, rather than by a "neutral and detached magistrate," was suppressed even though such warrants were specifically authorized by a state statute. 403 U.S. at 449-453. And in *Berger* v. *New York,* 388 U.S. 41 (1967) evidence obtained through electronic eavesdropping under the specific authority of a New York statute was suppressed because the statute violated the Fourth Amendment. In neither of these cases was the good faith of the officers relevant.[11] In sum,

11. The issue in this case is markedly different from that in *Michigan* v. *De Fillippo,* No. 77-1680, referred to by appellee (Br. at 85). In that case, the Michigan ordinance did not command a direct violation of the Fourth Amendment but arguably violated the Due Process Clause of the Fourteenth Amendment because it defined criminal behavior in an unconstitutional manner. If a "good faith" inquiry is at all relevant in that context, it is because otherwise a police officer might be required to determine whether statutes defining certain behavior as criminal were unconstitutional. That is a far cry from cases like this one where the statute in question violates the Fourth Amendment on its face. See, *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 877-878 (1975); *Almeida-Sanchez* v. *United States,* 413 U.S. at 272. Thus, if the police officers in *De Fillippo* had probable cause to arrest, it could still be argued that no Fourth Amendment violation had occurred. Here, that is impossible because New York's arrest statutes either violate the Fourth Amendment or they do not.

the result sought by appellee in *Payton* is squarely at odds with the Court's prior decisions and established principles of constitutional decision-making.

Besides being unfounded in sound constitutional doctrine, the four-pronged rule appellee proposes is simply unworkable. First, determining whether a given statute is ambiguous would be extremely difficult. Many statutes clear on their face may not be clear when they are applied to particular factual situations, and trial courts would have justified difficulty in deciding whether such statutes are "ambiguous" within the meaning of appellee's proposed rule.[12] Even more cumbersome is the proposal that the exclusionary rule should apply when the "statute was designed to evade Fourth Amendment requirements" (Br. at 89). Under the best of circumstances, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment" [*Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971)], and such a complex inquiry should not be thrust upon local trial courts attempting to hold suppression hearings in routine criminal cases.

The final branch of appellee's proposed rule is the least manageable of all. Appellee suggests that suppression should be denied only when no one in the law enforcement hierarchy "could have any reasonable doubt about the statute's validity" (Br. at 89), but what creates such a

12. For example, where a statute simply states that police may enter homes to arrest, without mentioning warrants, the statute is unambiguous on its face. But the silence of the statute with regard to warrants renders it less than clear on that score, and the legislature cannot certainly be said to have authorized warrantless entries. Thus the criterion of "lack of ambiguity" is itself fairly ambiguous.

"reasonable doubt" is not clear.[13] In the instant case, for example, Mr. Justice Harlan's statements in *Jones* v. *United States*, 357 U.S. 493, 499-500 (1957), cases such as *Accarino* v. *United States*, 179 F.2d 456 (D.C. Cir. 1949) and *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958), as well as this Court's creation of the "hot pursuit" exception in *Warden* v. *Hayden*, 387 U.S. 294 (1967), and the treatment of the issue as a substantial constitutional question in *Lankford* v. *Gelston*, 364 F.2d 197, 205-206 (4th Cir. 1966) should have caused doubt about the viability of the statute prior to the entry into Payton's apartment.[14] Indeed, the holdings of a single court, or even a persuasive law review article, might cause doubts about the validity of legislation. But the inquiry about when such a doubt arose, or should have arisen, is a morass into which courts should not be required to venture.

In conclusion, the momentous departure from sound principles of constitutional adjudication sought by appellee and the consequences which would ensue are simply not worth the price of denying Mr. Payton the relief which has

13. Here appellee abandons the premise adopted from *Peltier* that it is the officer's subjective good faith which is in question, and recognizes that there is a responsibility throughout the government for constitutional police behavior.

14. Appellee also implies that courts should rule on the merits of constitutional challenges to statutes, and apply the exclusionary rule, wherever the statute could be found unconstitutional by analogy with settled rules (Br. at 90). This conflicts with appellee's contention that the exclusionary rule should not apply in the *Payton* case, for in *Payton*, the argument that the warrant requirement should apply proceeds by direct analogy to firmly settled Fourth Amendment principles. Thus, if as appellee suggests, courts may apply the exclusionary rule in analogous cases, the exclusionary rule must apply here.

always been afforded litigants in the same posture. As even Professor Oaks has recognized,

> The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law.

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970).

Conclusion

For the reasons previously stated, the judgments in both *Payton* and *Riddick* should be reversed.

Respectfully submitted,

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